(18,972.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 321.

ADOLPHUS F. McCLAINE, PLAINTIFF IN ERROR,

vs.

GEORGE C. RANKIN, AS RECEIVER OF THE FIRST NATIONAL BANK OF SOUTH BEND, WASHINGTON.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from the circuit court of the United States for the district of Washington	1	1
Complaint	3	1
Demurrer	7	4
Order sustaining demurrer	9	5
Judgment	9	5
Mandate from United States circuit court of appeals	11	6
Order overruling demurrer, &c.	14	7
Order overruling second demurrer	15*a*	8
Amended answer	16	8
Demurrer to amended answer	35	19
Order sustaining demurrer to amended answer	36	19
Record of trial	37	20
Findings of fact	38	20
Conclusions of law	39	21
Defendant's exceptions to findings and conclusions	40	21
Judgment	43	22

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 6, 1903.

	Origina
Bill of exceptions	44
Plaintiff's offers	44
Plaintiff rests	45
Motion for nonsuit overruled	45
Defendant's offers	46
Testimony of Adolphus F. McClaine	47
Defendant rests	48
Plaintiff rests	48
Defendant's motion for judgment	48
Judge's certificate to bill of exceptions	50
Assignment of errors	50
Plaintiff's Exhibit B—Affidavit of Joseph G. Heim, exhibits, and stipulation	52
Defendant's Exhibit B—Record in case of Heim, receiver, *vs.* McClaine *et ux*	59
Complaint	59
Answer	64
Motion to substitute	70
Order to substitute	71
Amended reply	72
Order granting nonsuit	74
Defendant's Exhibit C—Stipulation as to correspondence, letters attached	75
No. 1—Petition and order in matter of the application of Joseph G. Heim, receiver, &c., for authority to compromise and sell remaining assets	86
Proceedings in United States circuit court of appeals	92½
Order of substitution	93
Order of submission	94
Opinion	95
Judgment	101
Order denying petition for rehearing	102
Petition for writ of error	103
Assignment of errors	108
Bond on writ of error	113
Clerk's certificate	115
Writ of error	116
Return to writ of error	117
Citation and service	118

iginal. Print
44 23
44 23
45 24
45 24
46 24
47 25
48 25
48 25
48 25
50 26
50 26
52 28
59 31
59 31
64 34
70 38
71 38
72 39
74 40
75 41
86 47
92½ 50
93 51
94 51
95 52
101 55
102 56
103 56
108 59
113 62
115 63
116 64
117 65
118 65

a In the United States Circuit Court of Appeals for the Ninth Circuit.

ADOLPHUS F. MCCLAINE, Plaintiff in Error,
vs.
GEORGE C. RANKIN, Successor to and Substituted for J. Frank Aldrich, as Receiver of the First National Bank of South Bend, Washington, Defendant in Error. } No. 793.

Upon writ of error to the United States circuit court for the district of Washington, western division.

1 In the Circuit Court of the United States for the District of Washington, Western Division, July Term, 1899.

2 Be it remembered, that on the 15th day of August, 1899, there was duly filed in said circuit court of the United States for the district of Washington, western division, a complaint, in words and figures as follows, to wit:

3 In the Circuit Court of the United States for the District of Washington, Western Division.

J. FRANK ALDRICH, as Receiver of the First National Bank of South Bend, Plaintiff,
vs.
ADOLPHUS F. MCCLAINE, Defendant.

Complaint.

Comes now J. Frank Aldrich, as receiver of the First National Bank of South Bend, plaintiff, and complains of Adolphus F. McClaine, defendant, and alleges:

I.

That the said First National Benk of South Bend is now and was at all the times hereinafter mentioned a banking corporation, duly organized and existing under and by virtue of the banking laws of the United States of America, located and formerly doing business at South Bend, in the State of Washington, in the district aforesaid.

II.

That the said First National Bank of South Bend became insolvent, closed its doors and suspended business on the 10th day
4 of August, 1895, and the Comptroller of the Currency of the United States having ascertained and determined that the said bank was insolvent, on the 17th day of August 1895, duly ap-

pointed Joseph G. Heim receiver of said First National Bank of South Bend, and the said Joseph G. Heim qualified and acted as receiver of said bank until he resigned his said office and position, and thereupon the plaintiff was on the 29th day of October, 1898, duly appointed receiver of said First National Bank of South Bend by the Comptroller of the Currency of the United States, and said plaintiff qualified as receiver aforesaid, and is now acting as such under and by virtue of the laws of the United States providing for the appointment of receivers of national banking associations.

III.

That on the 17th day of August, 1896, the deputy and acting Comptroller of the Currency of the United States having first ascertained and determined that the assets, property and credits of the said First national bank were wholly insufficient to pay its debts and liabilities and that it was necessary to the complete and entire administration of the trust reposed in said receiver, and in order to pay the liabilities of said banking association, that recourse should be had to the personal liability imposed upon the stockholders of said bank by the statutes of the United States in such case made and provided, levied an assessment and made a requisition upon the shareholders of the said The First National Bank of South Bend for fifty thousand dollars ($50,000), the said sum to be paid by them ratably on or before the 17th day of September, 1896, and the said deputy and acting Comptroller of the Currency of the United States made a demand upon each and every one of the said shareholders for one hundred dollars ($100) upon each and every share of the capital stock of said association held and owned by them respectively at the time of the failure and suspension of the said bank as aforesaid.

IV.

That the said Comptroller of the Currency, by written orders, under his seal of office, directed the receiver of said bank to take all necessary proceedings by suit or otherwise to enforce the liability of the said shareholders for each and every share of the capital stock held by them respectively at the date of the suspension of said bank.

V.

That at the date of the failure and suspension of said bank the defendant was the owner of twenty-five shares of the capital stock of said bank of the par value of one hundred dollars ($100) per share, and the same stood in his name as A. F. McClaine as owner upon the books of said association at said time, and said defendant is now, and was then and ever since has been the owner of the same, and has had due notice of the foregoing orders of the said Comptroller of the Currency. That defendant is now and was at all times herein mentioned a citizen and resident of the district and State of Washington and the western division of the said district.

6 VI.

That said Joseph G. Heim, as receiver, duly demanded of said defendant payment of said assessment upon said stock, and the said defendant was notified that in the event such payment was not made on or before the 17th day of September, 1896, suit would be commenced to enforce the payment thereof.

VII.

That the said assessment upon the said stock has not nor has any part thereof been paid except the sum of two hundred dollars ($200), paid in May, 1897, about the 22d day thereof.

VIII.

That by virtue of the premises and the statute in such case made and provided the defendant is indebted to the plaintiff in the sum of twenty-five hundred dollars ($2,500) and interest thereon from the 17th day of September, 1896, at the rate of seven (7) per cent. per annum, less the said sum of two hundred dollars ($200) paid as aforesaid.

Wherefore, plaintiff prays judgment against the defendant for the sum of twenty-five hundred dollars ($2,500), with interest thereon at the rate of seven (7) per cent. per annum from the 17th day of September, 1896, less the said sum of two hundred dollars ($200) paid as aforesaid, together with his costs and disbursements herein.

HUDSON AND HOLT,
Attorneys for Plaintiff.

Office and P. O. address No. 403–4–5 Berlin building, Tacoma, Washington.

7 STATE OF WASHINGTON, } ss:
County of Pierce, }

Robert G. Hudson, being first duly sworn deposes and says; That he is one of the attorneys for the plaintiff in the above-entitled action; that he has read the foregoing complaint; knows the contents thereof, and believes the same to be true; that he makes this affidavit because the said plaintiff is a nonresident of and now absent from the State and district wherein said action is brought, and affiant has personal knowledge of all the material allegations therein contained.

R. G. HUDSON.

Subscribed and sworn to before me this the 15th day of August, 1899.

[SEAL.]

R. S. HOLT,
Notary Public, Residing at Tacoma,
Pierce County, Washington.

And afterwards, to wit, on the 19th day of August, 1899, there was duly filed in said court in said cause a demurrer to complaint, in the words and figures following, to wit:

(Title of Court and Cause.)

Demurrer.

Comes now the defendant and demurs to the complaint of the plaintiff herein upon the following grounds, to wit:

8 I.

That the complaint does not state facts sufficient to constitute a cause of action.

II.

That the action has not been commenced within the time limited by law.

T. O. ABBOTT,
Attorney for Defendant.

Rooms 220–21, Fidelity bldg., Tacoma, Pierce county, Washington.

I, T. O. Abbott, do hereby certify that the foregoing demurrer is entered in the above-entitled action in good faith, and that I believe the grounds therein stated to be valid grounds of demurrer to the complaint therein.

T. O. ABBOTT,
Attorney for Defendant.

Received copy of within demurrer this 19th day of August, 1899.

HUDSON & HOLT,
Attorneys for Plaintiff.

9 And afterwards, to-wit: on Friday the 2nd day of February, 1900, the same being the 18th judicial day of the regular July term of said court, present the Honorable Cornelius H. Hanford, United States district judge, presiding, the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

J. FRANK ALDRICH, as Receiver of First National Bank of South Bend, Plaintiff,
vs.
ADOLPHUS F. MCCLAINE, Defendant.
No. 662.

Order on Demurrer and Judgment.

This cause having on a former day of this court come on for hearing on the demurrer of defendant to the complaint, and the same having been argued by T. O. Abbott, Esq., attorney for defendant, and Messrs. Hudson & Holt, attorneys for plaintiff, and the court having taken the same under advisement, and having rendered and filed herein an opinion sustaining said demurrer on the second ground thereof, to-wit: the statute of limitations; now, therefore, it is hereby

Ordered and adjudged that the demurrer of the defendant to the complaint herein, be and the same is hereby sustained on the following ground only, to-wit: "That the action has not been
10 commenced within the time limited by law."

Thereupon the plaintiff by his attorneys announced to the court that plaintiff would stand on his complaint and decline to plead further.

Whereupon it was further ordered and adjudged that said complaint and this action be and the same is hereby finally dismissed, and that defendant have and recover of plaintiff his costs herein. To all of which rulings the plaintiff at the time excepted, and had his exceptions duly allowed by the court.

Ordered and adjudged this the 2nd day of February, A. D. 1900.

C. H. HANFORD, *Judge.*

Endorsed: Filed in the U. S. circuit court Feb. 2, 1900. A. Reeves Ayres, clerk, Sam'l D. Bridges, dep.

And thereafter, by due proceedings had, a writ of error was duly issued in said cause to the United States circuit court of appeals for the ninth circuit, and

Afterwards, to-wit: on the 7th day of March, A. D. 1901, a mandate was issued by said court and duly entered in this action as hereafter appears.

11 And afterwards, to-wit: on the 27th day of March, 1901, there was duly filed in said court in said cause a mandate of the United States circuit court of appeals, in the words and figures following, to-wit:

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Washington, western division, Greeting:

Whereas, lately in the circuit court of the United States for the district of Washington, western division, before you, or some of you, in a cause between *J. Frank Aldrich*, as receiver of the First National Bank of South Bend, plaintiff, and *Adolphus F. McClaine*, defendant, No. 662, a judgment was duly filed and entered, which said judgment is of record in the office of the clerk of said circuit court (to which record reference is hereby made and the same is hereby expressly made a part hereof), as by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals for the ninth circuit by virtue of a writ of error agreeably to the act of Congress in such cases made and provided, fully and at large appears:

And whereas, on the 12th day of September, in the year of our Lord one thousand, nine hundred, the said cause came on to be heard before the said circuit court of appeals, on the said transcript of record, and was argued by counsel:

12 On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby reversed, with costs, and the cause remanded to said circuit court with directions to overrule the demurrer. (Feb'y 14, 1901.)

You therefore, are hereby commanded that such further proceedings be had in said cause, in accordance with the opinion and judgment of this court and as according to right and justice and the laws of the United States ought to be had, the said judgment of said circuit court notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 7th day of March, in the year of our Lord one thousand, nine hundred and one.

[SEAL OF THE COURT.] F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Costs of Plaintiff in Error.

Transcript, paid clerk below	$17.55
Clerk U. S. circuit court of appeals	25.25
Printing record	25.50
Attorney's docket fee	20.00
Taxed at	$88.30

F. D. MONCKTON, *Clerk.*

13 *Costs of Plaintiff in Error.*

Transcript, paid clerk below	$17.55
Docketing cause and filing record	5.00
Entering 2 appearances	.50
Entering order	.20
Filing 6 papers	1.50
Filing briefs for each party appearing	10.00
Printing transcript of record	25.50
Transferring cause to printer calendar	1.00
Drawing, filing and recording judgment	1.65
Mandate, costs and copy	5.40
Attorney's docket fee	20.00
Taxed at	$88.30

F. D. MONCKTON, *Clerk.*

Endorsed: Filed in the U. S. circuit court Mar. 27, 1901, A. Reeves Ayres, clerk, by Sam'l D. Bridges, dep.

14 And afterwards, to-wit: on the 27th day of March, 1901, there was duly filed in said court in said cause an order, in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

J. FRANK ALDRICH, as Receiver of First National Bank of South Bend, Plaintiff,
vs.
ADOLPHUS F. MCCLAINE, Defendant. } No. 662.

Order.

On motion of plaintiff, and in accordance with the mandate of the United States circuit court of appeals for the ninth circuit, in case numbered 604 therein, being a writ of error from this court sued out by the plaintiff in this action, directing this court to render an order in this action overruling the demurrer of the defendant herein,

It is hereby ordered that said demurrer be and the same is hereby overruled, and the final judgment heretofore rendered in this action in this court sustaining said demurrer and dismissing plaintiff's complaint, is set aside and annulled.

It is further ordered that the plaintiff have and recover of and from the defendant, Adolphus F. McClaine, in the sum of $88.30, being the amount of costs as shown by said mandate for which he is liable in the writ of error sued out to said circuit court of appeals.

15 Ordered and adjudged this the 27th day of March, A. D. 1901.

C. H. HANFORD, *Judge.*

Endorsed: Filed in the U. S. circuit court Mar. 27, 1901. A. Reeves Ayres, clerk, by Sam'l D. Bridges, dep.

15*a* And afterwards, to wit, on Wednesday, the 29th day of May, 1901, the same being the nineteenth judicial day of the regular February term—the Honorable C. H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

Order Overruling Second Demurrer.

Now, on this day, on motion of the defendant, leave is granted the defendant to file a second demurrer to the complaint herein; whereupon said demurrer was argued by counsel, and the court being duly advised in the premises, orders that the said demurrer be, and the same is hereby, overruled.

To which ruling the defendant excepted, and his said exception is hereby allowed.

It is further ordered that said defendant be, and he is hereby, granted ten days within which to file his answer herein.

16 And afterwards, to wit: on the 13th day of June, 1901, there was duly filed in said court in said cause an amended answer, in the words and figures following, to wit:

(Title of Court and Cause.)

Amended Answer.

Comes now the defendant and not waiving any rights heretofore existing in this action for his answer to the complaint of plaintiff, states as follows, to wit:

I.

He admits the allegations of paragraph I of said complaint.

II.

He admits the allegations of paragraph II of said complaint.

17 III.

He denies all the allegations of paragraph III of said complaint.

IV.

He denies all the allegations of paragraph IV of said complaint.

V.

He admits all the allegations of paragraph V of said complaint, except that he has had due notice or any notice of any of the orders or alleged orders referred to in said paragraph; which allegations he denies.

VI.

He denies all the allegations of paragraph VI of said complaint.

VII.

He denies all the allegations of paragraph VII of said complaint.

VIII.

He denies all the allegations of paragraph VIII of said complaint.

For a first affirmative defense to the allegations of said complaint, defendant alleges as follows, to wit:

I.

That on or about the 30th day of December, 1897, Joseph G. Heim, as receiver of said First National Bank of South Bend, Washington, while acting as said receiver, and before his resignation and the appointment of the plaintiff herein, began an action against this defendant in the superior court of the State of Washing-
18 ton for Pierce county, which said action was numbered 16,663 among the records of the clerk of said court; the complaint in said action, being in words and figures as follows, to wit:

In the Superior Court of the State of Washington in and for the County of Pierce.

JOSEPH G. HEIM, as Receiver of the First National Bank of South Bend, Washington, Plaintiff,
vs.
A. F. McCLAINE and MAE U. McCLAINE, His Wife, Defendants.

Complaint.

The above-named plaintiff, as receiver of the First National Bank of South Bend, Washington, complains of the said defendants and alleges:

First. That the First National Bank of South Bend, Washington, is and was at all the times herein mentioned, a banking corporation, organized under the laws of the United States.

Second. That said First national bank being insolvent closed its doors and suspended business on the 10th day of August, 1895, and the Comptroller of the Currency of the United States having ascer-

tained and determined that the said bank was insolvent on the 17th day of August, 1895, duly appointed Joseph G. Heim, the plaintiff the receiver of the said First national bank, the said Joseph G
19 Heim is now the duly appointed acting and qualified receiver of said corporation under and by virtue of the laws of the United States providing for the appointment of receivers of national banking associations.

Third. That on the 17th day of August, 1896, the deputy and acting Comptroller of the Currency of the United States, having first ascertained and determined that the assets, property and credits of said First national bank were wholly insufficient to pay its debts and liabilities, and that it was necessary to the complete and entire administration of the trust reposed in him, and in order to pay the liabilities of said banking association that recourse should be had to the personal liability imposed upon the stockholders of said bank by the statutes in such case made and provided, levied an assessment and made a requisition upon the shareholders of the said "The First National Bank of South Bend" for fifty thousand dollars ($50,000) to be paid by them ratably on or before the 17th day of September, 1896, and made a demand upon each and every one of said shareholders for one hundred dollars ($100) upon each and every share of the capital stock of said association held or owned by them respectively at the time of its failure.

Fourth. That the said deputy Comptroller of the Currency by a written order dated the 17th day of August, 1896, and under his seal of office, directed this plaintiff, as said receiver, to take all necessary proceedings, by suit or otherwise, to enforce the liability of the said stockholders to the extent of one hundred dollars ($100) upon each and every share of the said capital stock held or owned
20 by them, respectively, at the date of the suspension of said bank.

Fifth. That at the date of the failure of said bank, the defendant, A. F. McClaine, was the owner of twenty-five (25) shares of the capital stock of said bank of the par value of one hundred dollars ($100) per share, and the same stood in his name as such owner upon the books of said association at said time, and said defendant is now and ever since has been the owner of the same, and said defendant has had due notice of the foregoing order of said deputy Comptroller of the Currency.

Sixth. That this plaintiff has duly demanded of the said defendant, A. F. McClaine, the payment of said assessment upon the said stock and said defendant was notified that in the event such payment was not made on or before the 17th day of September, 1896, suit would be commenced to enforce the payment thereof.

Seventh. That at the time said defendant, A. F. McClaine, subscribed and secured the said shares of stock of said banking association and now and ever since said date, he and the defendant, Mae U. McClaine, were husband and wife, and that said subscription and said ownership of said stock was and is for the benefit of the com-

munity then and now existing between the said A. F. McClaine and Mae U. McClaine, his wife.

Eighth. That said assessment upon said stock has not, nor has any part thereof been paid; that by virtue of the premises and of the statutes in such case made and provided, the defendant, A. F. McClaine and the community composed of said A. F. Mc-
21 Claine and Mae U. McClaine, became and are indebted to the plaintiff in the sum of twenty-five hundred dollars ($2500), with interest thereon from the 17th day of September, 1896.

Wherefore, the plaintiff prays for a judgment against A. F. McClaine in the sum of twenty-five hundred dollars ($2500), with interest thereon from the 17th day of September, 1896, at the rate of seven (7) per cent. per annum, and for his costs and disbursements herein.

It is further prayed that the judgment herein be declared a charge upon the community property of said A. F. McClaine and Mae U. McClaine.

BONEY & HOYT,
Attorneys for Plaintiff.

P. O. and office address, 526 the Rookery, Spokane, Washington.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Richard K. Boney, being duly sworn, deposes and says:

That he is one of the firm of Boney & Hoyt, attorneys for the plaintiff in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true; that he makes this affidavit because the said Joseph G. Heim is not now within the said county of Spokane, nor within the said county of Pierce, and because the said affiant has personal knowledge of all the material allegations contained in the foregoing complaint.

RICHARD K. BONEY.

Subscribed and sworn to before me this 28th day of February, 1897.

E. W. TAYLOR,
Notary Public, Residing at Spokane, Washington.

22 II.

That thereafter on said date, the findings of fact and conclusions of law of said court were entered in said cause wherein and whereby all the allegations of said complaint were found and declared to be true and decree was thereupon entered against this defendant in words and figures as follows, to wit:

In the Superior Court of the State of Washington in and for the County of Pierce.

JOSEPH G. HEIM, as Receiver of the First National Bank of South Bend, Washington, Plaintiff,
vs.
A. F. McCLAINE and MAE U. McCLAINE, His Wife, Defendants.

Decree.

The plaintiff having moved the court for judgment upon the foregoing facts and conclusions of law found by the court, and the court upon consideration thereof, does hereby order, adjudged and decree as follows, to wit:

That the plaintiff, Joseph G. Heim, as receiver of the First National Bank of South Bend, Washington, do have and recover from the defendant, A. F. McClaine, the sum of two thousand three hundred dollars ($2,300.00) with interest thereon at the rate of seven per cent. per annum from the 17th day of September, 1896, until paid.

23 And does further order, adjudge and decree that said defendant pay the costs and disbursements of this action, taxed at the sum of $10.00.

And it is hereby further adjudged and decreed that the plaintiff have execution against said defendant to enforce the payment of the sum so decreed to be paid, and the said costs and disbursements.

And it is further ordered that such execution issue against the community property of the said A. F. McClaine and Mae U. McClaine, his wife, as well as against the individual property of said A. F. McClaine.

Dated December 30th, 1897.

J. A. WILLIAMSON,
Superior Judge.

III.

That thereafter, to wit, on the 21st day of March, 1899, an order was made by said superior court in said cause vacating and setting aside the decree set forth in the preceding paragraph hereof, said order being in words and figures, as follows, to wit:

24 In the Superior Court, Pierce County, Washington.

JOSEPH G. HEIM, Receiver, etc., Plaintiff,
vs.
A. F. MCCLAINE ET AL., Defendants. } No. 16663.

Memorandum of Journal Entry.

This cause coming on to be heard, upon the motion of defendants, filed herein, to vacate and set aside the judgment entered in this action on the 30th day of December, 1897, and the court having examined the evidence in support of said motion, and having heard argument of counsel, and being fully advised; it is hereby ordered, adjudged and decreed, that the said judgment be and hereby is vacated and set aside, and is declared of no effect and void and the clerk of this court is hereby directed to cancel and discharge the same upon the records.

IV.

That thereafter, to wit, on the 10th day of March, 1898, an order was entered in said action by said superior court at the request of the plaintiff in said action, dismissing said action, and without notice to the defendant therein, without prejudice; said order being in words and figures, as follows, to wit:

25 In the Superior Court of the State of Washington in and for the County of Pierce.

JOSEPH G. HEIM, as Receiver of the First National Bank of South Bend, Washington, Plaintiff,
vs.
A. F. MCCLAINE ET AL., Defendants. } No. 16663. Department 1.

Order Dismissing Action.

The above-entitled cause coming on regularly to be heard upon the motion of the plaintiff for an order dismissing the action, and the court having read the affidavit of Richard K. Boney in support of said motion, and having examined the files herein, and it appearing to the court that no answer has been interposed in said action, and no counterclaim or setoff having been set up by said defendants, or either of them.

It is by the court ordered that said action be, and the same is hereby dismissed, without prejudice, at plaintiff's cost.

Done in open court this 10th day of March, 1898.

J. A. WILLIAMSON, *Judge.*

V.

That thereafter, to wit, on the 25th day of April, 1898, th
referred to in the last preceding paragraph hereof, was on
plication of the defendant therein and after a hearin
26 the merits thereof, amended by said superior court
order, duly entered on said date; said order being in
and figures, as follows, to wit:

In the Superior Court, Pierce County, Washington.

JOSEPH G. HEIM, Receiver, etc., Plaintiff,
vs.
A. F. MCCLAINE ET AL., Defendants.

Memorandum of Journal Entry.

This cause coming on this day for hearing on the motion
fendants for an order setting aside the order of dismissal
action because said defendants were never served with notice
application for dismissal and the court, having heard said
and argument of counsel, and the counsel for defendants
other things objected to said order of dismissal so far as it
that this action was dismissed without prejudice, whereupon
for plaintiff consented that the words "without prejudice"
dismissal might be stricken out, it is therefore ordered tha
words "without prejudice" be stricken out of said order of dis
and that said motion to set aside said order of dismissal be, a
same is, hereby overruled and dismissed, to which defendants
and their exceptions are allowed.

VI.

That all of the matters and proceedings set forth a
27 curring in said action in said superior court related
were on account of the assessment or alleged assessm
forth in the complaint herein; and that this plaintiff was
thereby barred and estopped from maintaining this action.

And for a second affirmative defense, and by way of counte
plaintiff alleges as follows, to wit:

I.

That on or about the 5th day of April, 1897, Joseph G. He
then being the duly qualified and acting receiver of the said
National Bank of South Bend, brought an action in the su
court of the State of Washington, for Pierce county, against
fendant herein on account of the assessment or alleged asse
set forth in the complaint herein, by serving upon said defen
copy of the original summons and complaint in said action.

II.

That on or about the 8th day of April, 1897, and before the original summons and complaint in said action had been filed with the clerk of said court, this defendant, by way of compromise of the said claim, made a certain proposal in writing to said Heim as said receiver for the dismissal of said action, as follows, to wit:

That in consideration of the immediate dismissal of said action, this defendant would sell and deed to said plaintiff those certain premises known and described as lots three (3) and four (4), block twenty-seven (27), corrected plat of South Bend, at the agreed price
of four hundred fifteen and eighty-three one hundredths
28 dollars ($415.83), the sum of two hundred fifteen and eighty-three one hundredths dollars ($215.83) thereof to be applied in payment of a claim held by said plaintiff against one J. W. Morgan (amounting to said sum of two hundred fifteen and eighty-three one hundredths dollars) and the sum of two hundred dollars ($200), thereof, to be credited upon said stock assessment; (the same being the stock assessment referred to in the complaint herein); and thereafter, said Heim as said receiver, did notify this defendant that he accepted said proposal, according to the terms thereof, and did request defendant to execute and forward to him in his capacity as said receiver, a good and sufficient deed to said premises.

III.

That on or about the 29th day of April, 1897, this defendant, relying upon the good faith and honesty of purpose of said Heim as said receiver, and believing that he would faithfully carry out said agreement to dismiss said action; did make, execute and deliver to said Heim as said receiver, a good and sufficient deed to said premises, and said Heim as said receiver, did accept said deed, and did as this defendant is informed and believes, place said real property among the assets of his said trust.

IV.

That, contrary to the terms of said agreement, and in violation thereof, the said Heim, as said receiver, did not dismiss said action, but did subsequently, to wit: on the 30th day of December, 1897,
file the original of said summons and complaint, with the
29 clerk of said superior court, and said cause was numbered 16,663 among the records of said clerk; and said Heim, as said receiver, did apply for and obtain a default against this defendant and did apply for and obtain a judgment against this defendant on account of the matters alleged in said complaint in the sum of twenty-three hundred dollars ($2300) with interest thereon at the rate of seven per cent. per annum from the 17th day of September, 1896, together with costs taxed in said action at ten dollars ($10); that thereafter, upon the application of defendant, by due proceedings had in said action, after a trial upon the merits thereof,

said judgment was vacated and set aside and declared of no effect and void.

V.

That thereafter, and before said summons and complaint was filed as aforesaid, to wit, on or about the 8th day of April 1897, at the request of said Heim as said receiver, this defendant made further proposals to said Heim as said receiver, to compromise and settle the balance of the said assessment in excess of the amount to be credited thereon as the proceeds of the sale of said premises; and said Heim as said receiver, did urge and request defendant to make a payment to him as an inducement and evidence of good faith on the part of defendant, to enable him to secure the ratification and confirmation of said further proposal, by the Comptroller of the Currency and by a court of competent jurisdiction, and on or about the 27th day of May, 1897, in order to induce the said Heim as said receiver to secure the confirmation and ratification of said further proposal by the Comptroller of the Currency, and by a court of competent jurisdiction, did pay to said Heim as said receiver, to be by him held in trust for this defendant until said further proposal should be so confirmed and ratified, the sum of two hundred dollars ($200), gold coin of the United States of America, which said sum, the said Heim as said receiver, did accept for said purpose; but defendant alleges that the proposal in this paragraph mentioned, was afterwards declined by said Helm as said receiver, and that he failed and neglected to make any effort to secure the ratification and confirmation thereof as aforesaid, and that said proposal was never ratified or confirmed by said Comptroller of the Currency, or by any court of competent jurisdiction; and defendant is informed and believes that said sum of two hundred dollars ($200) was deposited by said Heim as said receiver among the assets of his said trust, and is now held by the plaintiff herein as a part of said assets.

VI.

(Stricken.)

That, thereafter, to wit, on or about the 18th day of April, 1898, the said Heim as said receiver, began an action against this defendant in the circuit court of the United States for the district of Washington, western division, for the alleged purpose of recovering judgment against this defendant, on account of an alleged contract growing out of the proposals hereinbefore set forth; that said cause was numbered 588 among the records of the clerk of said circuit court; and thereafter, the plaintiff herein was substituted as the plaintiff in said action, the said Heim having theretofore resigned his said office as said receiver; and thereafter, to wit, on or about the 24th day of June, 1899, by due proceedings had, and after a full trial of all the issues and facts therein, upon

the merits thereof, judgment was rendered in favor of this defendant and against the plaintiff herein, dismissing said action.

VII.

That, under and by virtue of all the matters and things hereinbefore in this affirmative defense set forth, the benefits and advantages of the said proposals for a compromise of said claim was and were totally lost to this defendant, and the consideration for the making of the said deed to said premises and the payment of the said sum of two hundred dollars ($200) to said Heim as said receiver, totally failed; and the said plaintiff herein, has unlawfully converted the same without the consent and against the will of this defendant.

VIII.

(Stricken.)

That defendant was compelled, on account of the various proceedings hereinbefore in this affirmative defense set forth, to employ counsel, and the fair and reasonable value of the services as said attorneys' fees is three hundred and fifty dollars ($350).

IX.

(Stricken.)

That the true and fair value of the premises hereinbefore
32 described is fifteen hundred dollars ($1500); and the true and fair value of the gold coin paid into the hands of said Heim, as aforesaid, is two hundred dollars ($200) together with legal interest thereon from the 27th day of May, 1897.

X.

(Stricken.)

That defendant has made demand upon the plaintiff for the return of said described premises, or in lieu thereof, of the sum of fifteen hundred dollars ($1500); and also for the sum of two hundred dollars ($200), together with interest thereon from the 27th day of May, 1897, at the legal rate; and also for the sum of three hundred and fifty dollars ($350) on account of expenses and attorneys' fees incurred in the various actions hereinbefore mentioned; and said demands and each of them have been refused by plaintiff and he has refused and declined to pay the same or any part thereof.

XI.

That, by virtue of all the matters and things hereinbefore set forth, this defendant has been damaged as follows, to wit:

(Stricken.)

On account of the unlawful conversion of said premises as afore said, the sum of fifteen hundred dollars ($1500);

On account of the payment to said plaintiff on the 22d day of May, 1897, as aforesaid, the sum of two hundred dollars, ($200), together with interest thereon at the legal rate from said date.

33 (Stricken.)

On account of expenses and attorneys' fees incurred as aforesaid, the sum of three hundred and fifty dollars ($350).

Wherefore, defendant prays judgment against the plaintiff as follows, to wit:

First. That he be dismissed hence without day.

Second. That he do have and recover judgment against the plaintiff as damages in the sum of fifteen hundred dollars ($1500); and also for the sum of two hundred dollars ($200), with interest thereon from the 22d day of April, 1897, at the legal rate; also for the sum of three hundred and fifty dollars as attorneys' fees.

Third. For such other and further relief as to the court shall seem equitable and just, the premises considered.

T. O. ABBOTT,
Attorney for Defendant, Rooms 408–10,
Equitable Bldg., Tacoma, Wash.

STATE OF WASHINGTON, } ss:
County of Pierce, }

I, A. F. McClaine, being first duly sworn, do on oath, depose and say that I am the defendant in the foregoing entitled action; that I have read the foregoing answer, know the contents thereof, and the same is true, as I verily believe.

A. F. McCLAINE.

34 Subscribed and sworn to before me this 6th day of June, 1901.

[SEAL.]

F. H. MURRAY,
Notary Public, Residing at Tacoma,
Pierce County, Washington.

Received copy of within answer this 6th day of June, 1901.

HUDSON & HOLT,
Attorneys for Plaintiffs.

35 And afterwards, to wit, on the 10th day of July, 1901, there was duly filed in said court in said cause a demurrer to amended answer, in the words and figures, following, to wit:

(Title of Court and Cause.)

Demurrer to Amended Answer.

Now comes the plaintiff by his attorneys, Hudson & Holt, and demurs to that part of the amended answer of defendant, styled "first affirmative defense."

Because the matter set out therein does not constitute a defense to the action.

HUDSON & HOLT,
Attorneys for the Plaintiff.

I, R. G. Hudson, of the firm of Hudson & Holt, attorneys for the plaintiff in the aforesaid action, do hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

——— ———.

I hereby acknowledge receipt of a copy of the aforesaid demurrer this the 10th day of July, 1901.

T. O. ABBOTT,
Attorney for Defendant.

And afterwards, to wit, on the 10th day of July, 1901, there was duly filed in said court in said cause an order, in the words and figures following, to wit:

36 (Title of Court and Cause.)

Order.

The demurrer of plaintiff to the first affirmative defense in the amended answer of defendant and the motion to strike certain portions of the second affirmative defense and counterclaim of said answer, came on this day for hearing; and the same being fully heard and considered by the court:

It is ordered that the said demurrer and motion be, and the same are hereby sustained, and the following portions of said amended answer are stricken out, to wit: Paragraphs VI, VIII, IX, X, and the following words in paragraph XI, viz: "On account of the unlawful conversion of said premises as aforesaid the sum of fifteen hundred dollars ($1500)" of that portion of said answer called the second affirmative defense and counterclaim. Plaintiff is allowed ten days to file a reply.

To all of which said defendant excepted and had his exception allowed.

Ordered this the 10th day of July, A. D. 1901.

C. H. HANFORD, *Judge.*

37 And afterwards, on Wednesday, the 20th day of November, 1901, the same being the 13th day of the regular July term of said court—present, the Honorable C. H. Hanford, United States district judge presiding—the following proceedings were had in said action, to wit:

Record of Trial.

Now, on this day, this action came regularly on for trial before the court without a jury, a trial by jury having heretofore, by a stipulation in writing duly filed herein, been expressly waived, Mr. R. G. Hudson appearing for the plaintiff, and Mr. T. O. Abbott, appearing for the defendant. At the conclusion of the introduction of evidence and the arguments of counsel, the court orally announced its decision in favor of the plaintiff, and directed that judgment be entered in accordance with said decision as announced.

And afterwards, to wit, on the 27th day of November, 1901, there *was* duly filed in said court in said cause findings and conclusions, in the words and figures following to wit:

(Title of Court and Cause.)

Findings and Conclusions.

This action came on regularly for trial before the court, a jury being waived, on the 20th day of November, A. D. 1901, and the same was fully heard, and argued by counsel of the respect-
38 ive parties, and the court, having fully considered of the same, and announced a decision in favor of plaintiff, and continued the matter of findings of fact and conclusions of law to this date, doth now make the following findings and conclusions:

Findings of Fact.

1st. That the First National Bank of South Bend, Washington, was and is a corporation duly organized under the laws of the United States, and formerly doing business at South Bend, Washington.

2d. That said bank became insolvent and suspended business August 10th, 1895; that a receiver was appointed therefor and the plaintiff is now its receiver.

3d. That on August 17th, 1896, the deputy and acting Comptroller of the Currency of the United States, after ascertaining and determining that the assets and property of said bank were wholly insufficient to pay its debts and liabilities and that it was necessary to levy an assessment on the stockholders, of one hundred per cent. Made said levy on August 17th, 1896.

4th. That said levy was made, and the defendant was given due notice thereof, and a demand was duly made of him to pay said assessment on or before the 17th day of September, 1896.

5th. That the defendant was the owner of twenty-five shares of the stock of said bank of the par value of $100 per share, and the amount of the assessment against him was $2,500.

6th. That the plaintiff admits a payment of $200 in money
39 by said defendant, made to the former receiver under a proposition of compromise of the claim sued on in this action, and has given credit therefor in his complaint.

7th. That plaintiff also in his reply offers to give credit for $200 additional on said claim as of April 29th, 1897, on account of the transfer by the defendants to the former receiver, of lots 3 and 4, block 27, corrected plat of South Bend, which offer the defendant now, in open court, declined to refuse or accept.

Conclusions of Law.

The court concludes that plaintiff is entitled to recover of defendant the sum of $2,500, with interest thereon from September 17th, 1896, at the rate of seven per cent. per annum, less a credit thereon of two hundred dollars on the 22d day of May, 1897, and a further credit of $200 of date April 29th, 1897, on account of the transfer of lots 3 and 4, block 27, corrected plat of South Bend, if he would accept the same, but as he declines to say whether he will accept the same or not, the court concludes that it has no right to allow said credit of its own motion and without the assent of the defendant.

Dated this the 27th day of November, A. D., 1901.

C. H. HANFORD, *Judge.*

Service by receipt of a copy hereof admitted this 26th day of November, 1901.

T. O. ABBOTT,
Attorney for Defendant.

40 And afterwards, to wit, on the 27th day of November, 1901, there *was* duly filed in said court in said cause defendant's exceptions to findings and conclusion, in the words and figures following, to wit:

(Title of Court and Cause.)

Defendant's Exceptions to Findings and Conclusion.

Comes now the defendant, and reserving all rights heretofore reserved during any of the proceedings herein, and excepts to the findings of fact and conclusion of law, heretofore entered by this court, as follows:

I.

He excepts to the 3d finding of fact upon the ground that the same is not supported by evidence herein.

II.

He excepts to the 4th finding of fact upon the ground that the same is not supported by evidence herein.

III.

He excepts to the 5th finding of fact upon the ground that the same is not supported by evidence herein.

IV.

He excepts to the 6th finding of fact upon the ground that the same is not supported by evidence herein.

V.

He excepts to the 7th finding of fact upon the ground that the same is not supported by evidence herein.

41 & 42 VI.

He excepts to the conclusions of law upon the ground that the same *is* not based upon or supported by the findings of fact.

T. O. ABBOTT,
Attorney for Defendant.

Rooms 408–10 Equitable bldg., Tacoma, Washington.

Exceptions allowed.

C. H. HANFORD, *Judge.*

Received copy 11–27, '01.

HUDSON & HOLT, *Attorneys.*

43 And afterwards, to wit, on the 27th day of November, 1901, there was duly filed in said court in said cause a judgment, in the words and figures following, to wit:

(Title of Court and Cause.)

Judgment.

The court, having made its findings of fact and conclusions of law in this action, it is

Ordered and adjudged that the plaintiff, J. Frank Aldrich as receiver of the First National Bank of South Bend, Washington, do have and recover of the defendant, Adolphus F. McClaine, the sum

of thirty-one hundred and eighty-three and $\frac{47}{100}$ ($3183.47) dollars, the amount now due and the costs of this action, taxed at — dollars, and that execution issue therefor, according to law.

Ordered and adjudged this the 27th day of November, A. D. 1901.

C. H. HANFORD, *Judge.*

Defendant excepts Exception allowed.

C. H. HANFORD, *Judge.*

44 And afterwards, to wit, on the 4th day of December, 1901, there was duly filed in said court in said cause a bill of exceptions, in the words and figures following, to wit:

(Title of Court and Cause.)

Bill of Exceptions.

Be it remembered, that on the 23d day of November, 1901, at a stated term of said court begun and holden in the city of Tacoma, in and for the district aforesaid, before his honor C. H. Hanford, circuit judge, the issues joined in the above cause between the said parties came on to be tried before the said judge without the intervention of a jury, the parties aforesaid, by their counsel, having according to the statute in such case made and provided, waived a jury; the plaintiff being represented by his attorneys, Hudson and Holt, and the defendant by his attorney, T. O. Abbott; and upon trial of said issues, the plaintiff offered in evidence the following:

A certified copy of an order of the deputy and acting Comptroller of the Currency of the United States, making an assessment of the shareholders of the First National Bank of South Bend, Washington, dated August 17, 1896; the same was received by the court and marked Plaintiff's Exhibit "A."

An affidavit of Joseph G. Heim, dated October 1st, 1901, attached to which, were two certain exhibits, and a stipulation of the parties hereto, that the said affidavit and exhibits might be offered in evidence subject to any objection to the incompetency, immateri-
45 ality, and irrelevancy of the subject matter thereof, but waiving objection as to the manner of taking the same. The defendant objected to the said affidavit, and said exhibits, on the ground that the same were incompetent, immaterial, and irrelevant; and further, that the said exhibits were not the best evidence of the matters therein purported to be set forth, upon the ground that they were not original documents, and that no demand had been made upon the defendant for the originals thereof. And after argument by counsel, the objection of the defendant was overruled, and said affidavit was admitted by the court, and marked Plaintiff's Exhibit "B;" whereupon said defendant excepted to the said ruling of said court, and said exception was allowed.

A stipulation of the parties for the introduction of copies of c
tain records and that said copies should be of the same force a
effect as the originals thereof, and that no certification of said copi
should be required under said stipulation, plaintiff offered the co
plaint and answer and amended answer of A. F. McClaine in th
certain action formerly pending in the above-entitled court betwe
these parties, numbered 588 among the records of the clerk of sa
court, which said papers were received by said court without obj
tion.

Thereupon plaintiff rested.

Thereupon, the defendant moved for a nonsuit, upon the grou
that the proof offered by the plaintiff was insufficient to justify
decision on behalf of plaintiff, and did not tend to prove any of t
material issues; said motion was denied by the court; to whi
order, defendant excepted and said exception was allowe

46 Whereupon, the defendant in order to maintain and pro
the issues on his parts, did offer in evidence the following:

A copy of the records and pleadings in that certain cause in t
superior court of the State of Washington for Pierce county, entitl
Joseph G. Heim, as receiver of the First National Bank of Sou
Bend, Washington, plaintiff, *vs.* A. F. McClaine and Mae U. M
Claine, his wife, defendants, numbered 16,663 among the records
the clerk of said superior court. The said offer was objected to
the plaintiff, because the same was not relevant, or material, and n
competent, under any issue or pleading in the case; but said obj
tion was overruled, and the said record was admitted and mark
Defendant's Exhibit "A."

A certified copy of the petition to the above-entitled court and t
order of the said court based upon said petition "in the matter
the application of Joseph G. Heim, receiver of the First Nation
Bank of South Bend, Washington, for authority to compromise a
sell the remaining assets of said bank in liquidation" (mark
"Defendant's Identification 1"), and also the order confirming t
acts and doings of the said Heim, as said receiver, acting under t
direction of the previous order of said court (marked as "Defen
ant's Identification 2"), for the purpose of showing that the plainti
in this action is not entitled to maintain the same for want of t
authority of the Comptroller of the Currency, and of a court of co
petent jurisdiction. The said offer was objected to by t

47 plaintiff, and after argument said objection was sustaine
to which order the defendant excepted, and said exceptio
was allowed.

The entire record in that certain action between the parties here
in the above-entitled court, numbered 588. Said offer was object
to by the plaintiff, because the same was not relevant or materia
and not competent under any issue or pleading in the case; whic
objection was overruled, and said record was admitted by the cou
and marked Defendant's Exhibit "B." Copies of letters relative
the assessment and matters connected therewith, the same bei
stipulated between the parties as true and correct copies of the ori

inals of said letters. The plaintiff objected to said letters being received in evidence, because the same were not relevant, or material and not competent under any issue or pleading in the case. Said objection was overruled, and said copies were received by the court and marked Defendant's Exhibit "C."

Whereupon, the defendant, ADOLPHUS F. MCCLAINE, was called as a witness in his own behalf, and testified as follows: That he had made no payments to the receiver of the said First National Bank of South Bend, on account of the assessment alleged in the complaint herein, but, that he had deeded to said receiver, lots three (3) and four (4), block twenty-seven (27), corrected plat of South Bend, for an agreed price in consideration of a compromise or proposed compromise of said assessment, and to induce the dismissal of a certain suit, then pending; and further, that he afterwards paid said receiver two hundred dollars ($200) for the purpose of a further
48 compromise of the balance of said assessment; that neither said lots nor said two hundred dollars ($200) had ever been returned to him; that the value of said lots was twelve hundred dollars ($1200). Thereupon, in answer to questions by the attorney for the plaintiff, the said witness stated that he lived in the city of Tacoma, and that he had never lived in said city of South Bend, and that he did not have general knowledge of the values of real property in said city of South Bend. Thereupon, said witness testified further in his own behalf, that he had special knowledge in regard to the value of said lots. Thereupon, said witness was excused.

Thereupon, defendant rested.

Thereupon, plaintiff rested.

Thereupon, the defendant moved for judgment against the plaintiff upon the ground that it appears from the evidence, that another action was brought by said plaintiff against this defendant for the purpose of recovering judgment upon an alleged contract of compromise of the assessment set forth in the complaint, and that said action was decided adversely to the plaintiff; and that therein and thereby, the plaintiff elected to recover upon said contract, and therein and thereby is estopped to maintain this action, the remedy herein sought, being inconsistent to the remedy sought in said action. And upon the further ground that this action is barred, and plaintiff is estopped from maintaining the same by reason of the institution of the said action numbered 16,663 in the said superior court of the State of Washington for Pierce
49 county, among the records of the clerk of said court, and the various proceedings had therein and the agreed dismissal thereof. And upon the further ground that the plaintiff herein has no power to maintain this action, for the reason that under and by virtue of the proceedings set forth "In the matter of the application of Joseph G. Heim, receiver of the First National Bank of South Bend, Washington, for authority to compromise and sell the remaining assets of said bank in liquidation," the

said proceedings not having been since altered, modified, or set aside, and no authority having been given by the Comptroller of the Currency, or by any court of competent jurisdiction to institute and maintain this action; and further that it appears from the evidence herein, that the plaintiff has obtained the premises known and described as lots three (3) and four (4), block twenty-seven (27) corrected plat of South Bend, together with two hundred dollars ($200) in cash, under and by virtue of negotiations for compromise and settlement of said assessment, and has not returned the same, or any part thereof, to this defendant, but withholds the same as part of the assets in his hands as said receiver. The said court, after considering the issues and the evidence submitted, denied the motion of defendant, rendered a decision in favor of the plaintiff and instructed the attorney for said plaintiff to prepare findings of fact and conclusions of law in accordance with said decision, and submit the same at the next sitting of said court.

And, now, on this 4th day of December, 1901, for as much as the facts aforesaid and the decisions of the court thereon, do
50 not appear of record, the defendant prays: That this, his bill of exceptions may be allowed; and that all the aforementioned exhibits be made a part hereof.

So ordered.

C. H. HANFORD, *Judge.*

Received December 4th, 1901, copy of bill of exceptions in the aforesaid action.

HUDSON & HOLT,
Attorneys for Plaintiff.

And afterwards, to wit, on the 28th day of December, 1901, there was duly filed in said court in said cause an assignment of errors in the words and figures following, to wit:

(Title of Court and Cause.)

Assignment of Errors.

Comes now the above-named defendant, by his attorney, T. O. Abbott, and says that in the record and proceedings in the above-entitled matter, there is manifest error in this, that is to say:

I.

In overruling the demurrer of the defendant to the plaintiff's complaint, and entering judgment against the defendant in the sum of $88.30; which said order was entered herein on March 27, 1901.

II.

In sustaining the demurrer of the plaintiff, to the first affirmative defense set forth in the amended answer of defendant, which
51 said order was entered herein on the 10th day of July, 1901.

III.

In sustaining the motion of plaintiff to strike certain portions of the second affirmative defense and counter-claim set forth in the amended answer of defendant, which said order was entered herein on the 10th day of July, 1901.

IV.

In admitting upon the trial of the issues herein, the affidavit of Joseph G. Heim, dated October 1, 1901, and the exhibits thereto attached, all marked Plaintiff's Exhibit "B."

V.

In denying defendant's motion for a nonsuit, at the close of plaintiff's proof upon the trial of the issues herein.

VI.

In refusing upon the said trial, to admit on behalf of the defendant, at said trial, a certified copy of the petition and order in the matter of Jos. G. Heim, as receiver of the First National Bank of South Bend, Washington, for authority to compromise and sell the remaining assets of said fund in liquidation, marked as Defendant's Identification "1"; and also the order confirming the sale of said assets, marked as Defendant's Identification "2."

VII.

In denying defendant's motion for judgment, made at the close of the said trial, and in rendering a decision in favor of the plaintiff.

52 VIII.

In entering the findings of fact and conclusions of law offered by the plaintiff, and in refusing to enter those offered by the defendant.

IX.

In entering the final order for judgment against the defendant, and in favor of the plaintiff, in the sum of three thousand one hundred eighty-three and seventeen one-hundredths dollars ($3,183.17); which said order was entered December 4, 1901.

Wherefore, the said Adolphus F. McClaine prays that the various orders aforesaid and each of them, be reversed, and that said court be ordered to dismiss him hence without day and award him costs and damages, according to event.

T. O. ABBOTT,
Attorney for Defendant.

Received copy of the foregoing assignment of errors, this 28th day of December, 1901.

HUDSON AND HOLT,
Attorneys for Plaintiff.

PLAINTIFF'S EXHIBIT "B."

(Exhibit "B" to affidavit of Joseph G. Heim, taken by me this, the 1st day of Oct., 1901. John T. Welsh, notary public.)

Registry Return Receipt Card.

Cancellation stamp: "Tacoma, Wash., Sept. 3, '96, 10 p. m."
53 Receiving stamp: "South Bend, Wash., Sep. 4, '96, 7 p. m."

Postoffice Department.

Official business.

Name of sender: J. G. Heim, South Bend, Wash.
Registry return receipt sent 9–2, 1896.
Reg. No. 112, from postoffice at South Bend, Wash.
Letter addressed to A. F. McLaine, Tacoma, Wash.
Received the above-described letter.

A. F. McCLAINE.
MAE U. McCLAINE.

No. 4467.

Treasury Department, office of the Comptroller of the Currency.

WASHINGTON, *August* 17, 1896.

In the Matter of the FIRST NATIONAL BANK OF SOUTH BEND, WASHINGTON.

To all whom it may concern:

Whereas, upon a proper accounting by the receiver heretofore appointed to collect the assets of "The First National Bank of South Bend," Washington, and upon a valuation of the uncollected assets remaining in his hands, it ap-ears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individnal liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed by section 5151 and 5234 of the Revised Statutes of the United States.

54 Now, therefore, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said "The First National Bank of South Bend" for fifty thousand dollars to be paid by them ratably on or before the seventeenth day of September, 1896, and I hereby make demand upon each and every one of them for one hundred dollars upon each and every share of the capital stock of said asso-

ciation held or owned by them, respectively, at the time of its failure; and I hereby direct Joseph G. Heim, the receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

In witness whereof, I have hereto set my hand and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this seventeenth day of August, A. D. 1896.

[SEAL.] GEO. M. COFFIN,
Deputy and Acting Comptroller of the Currency.

(Exhibit "A" to affidavit of Joseph G. Heim, taken by me this, the 1st day of October, 1901. John T. Welsh, notary public.)

Office of the receiver of the First National Bank of South Bend, Washington.

SOUTH BEND, WASHINGTON, *August* 17, 1896.

You will please take notice, that the Comptroller of the Cur-
55 rency has levied an assessment upon the stockholders of the First National Bank of South Bend, Washington, of one hundred dollars ($100.00) a share, payable at the office of the receiver, on or before September 17, 1896. The receiver is, however, authorized by the comptroller to grant an extension without interest, to shareholders who pay 25 per cent. of the assessment on or before that date, and who will give a written obligaton, satisfactorily guaranteed to pay 25 per cent. additional on or before October 17, 1896, 25 per cent. on or before November 17, 1896, and the remaining 25 per cent. on or before December 17, 1896.

You are therefore requested to pay the assessment on 25 shares of stock standing in your name, in accordance with the foregoing order and this notice, or suit will be commenced to enforce payment.

JOSEPH G. HEIM,
Receiver First National Bank of South Bend, Wash.

To A. F. McClaine, Tacoma, Washington.

(Title of Court and Cause.)

Affidavit of Joseph G. Heim.

STATE OF WASHINGTON, } *ss:*
County of Pacific, }

Joseph G. Heim, being by me the undersigned, a notary public in and for said State of Washington duly sworn deposes and says: That he was duly appointed receiver of the First National Bank of South Bend, Washington, and became such on August 17th, 1895, and acted as such for more than three years thereafter.

56 That on the 12th day of September, 1896, at South Bend, Washington, he mailed by registered letter to A. F. McClaine, the defendant in the aforesaid action, in a sealed envelope, addressed to said A. F. McClaine at Tacoma, Washington, his then residence and postoffice address, postage prepaid, a printed document, a copy of which is attached hereto and marked Exhibit "A" to this affidavit, consisting of two parts, namely, the action of the deputy and acting Comptroller of the Currency, Geo. M. Coffin, relative to an assessment against the stockholders of the First National Bank of South Bend, Washington, and styled "In the matter of the First National Bank of South Bend, Washington," dated August 17, 1896, and also a notice to the stockholders of said bank of said assessment and a demand for the payment thereof, said notice and demand being signed by affiant as receiver as aforesaid, and was dated August 17, 1896, and said notice at the bottom thereof was addressed to A. F. McClaine, Tacoma, Washington; and both of said parts were printed, except that in the notice a blank as to the number of shares had written therein with pen and ink, the figures "25," and the name of affiant was signed thereto by affiant with pen and ink, "Joseph G. Heim," and the name of "A. F. McClaine, Tacoma, Washington," at the foot of said notice, was written with pen and ink by this affiant;

That affiant received a receipt through the postoffice at South Bend, Washington, for said registered letter, which receipt is attached hereto and marked Exhibit "B";

57 That affiant did both prior and subsequent to the mailing of said document make personal demand upon said McClaine for the payment of said assessment, the exact dates of which affiant cannot now remember; that said McClaine, in his conversation with said affiant admitted having received said document, having knowledge thereof and of said assessment and of said demand;

That said McClaine paid affiant, as receiver as aforesaid, the sum of two hundred dollars by check, and the further sum of two hundred dollars by conveyance of lots three and four in block twenty-seven, corrected plat of South Bend, on account of and in connection with said liability on said assessment; and affiant never received from him, or anyone else for him, nor did he ever pay affiant any other sum or amount, either in money or otherwise, directly or indirectly, on account of or in connection with said assessment, or the claim against said McClaine for the same.

JOSEPH G. HEIM.

Subscribed and sworn to before me this the 1st day of October, A. D. 1901.

[SEAL.] JOHN T. WELSH,
Notary Public for the State of Washington,
Residing at South Bend, Washington.

(Title of Court and Cause.)

Stipulation.

It is hereby stipulated by and between the parties hereto through their respective attorneys that the annexed affidavit is the affidavit of Joseph G. Heim, and that the same was taken on October
58 1st, 1901, before John T. Welsh, notary public; and further, that the exhibits thereto attached and marked Exhibits "A" and "B" are the exhibits referred to in said affidavit; and it is further stipulated that the said Heim would, if he were present, testify as set forth in said affidavit; and it is further stipulated that the said affidavit and exhibit may be offered in evidence by the plaintiff in all respects as if the same had been taken upon commission duly issued, or as if the said Heim were present in court, the defendant reserving the right to object to said testimony upon the ground of the irrelevancy, incompetency, or immateriality thereof, but hereby waiving all right to object to the same by reason of the manner in which it was taken,

Dated Tacoma, Washington, October 3d, 1901.

HUDSON & HOLT,
Attorneys for Plaintiff.
T. O. ABBOTT,
Attorney for Defendant.

59 DEFENDANT'S EXHIBIT "B."

In the Circuit Court of the United States for the District of Washington, Western Division.

JOSEPH G. HEIM, as Receiver of the First National Bank of South Bend, Washington, Plaintiff,
vs.
A. F. MCCLAINE and MAE U. MCCLAINE, His Wife, Defendants.
No. 588.

Complaint.

The above-named plaintiff, as receiver of the First National Bank of South Bend, Washington, complains of the said defendants, and alleges:

1.

That the First National Bank of South Bend, Washington, is and was at all times herein mentioned a banking corporation organized under the laws of the United States, and doing business before its suspension at South Bend, in the aforesaid district.

2.

That said First national bank being insolvent closed its doors and suspended business on the 10th day of August, 1895, and the Comptroller of the Currency of the United States having ascertained and determined that the said bank was insolvent, on the 17th
60 day of August, 1895, duly appointed Joseph G. Heim, the plaintiff, the receiver of the said First national bank, and said Joseph G. Heim is now and has been since August, 1895, the duly appointed, acting and qualified receiver of said corporation under and by virtue of the laws of the United States providing for the appointment of receivers of national banking associations.

3.

That on the 17th day of August, 1896, the deputy and acting Comptroller of the Currency of the United States, having first ascertained and determined that the assets, property, and credits of the said First national bank were wholly insufficient to pay its debts and liabilities, and that it was necessary to the complete and entire administration of the trust reposed in him, and in order to pay the liabilities of said banking association, that recourse should be had to the personal liability imposed upon the stockholders of said bank by the statutes in such cases made and provided, levied an assessment and made a requisition upon the shareholders of the said "The First National Bank of South Bend," for fifty thousand dollars, to be paid by them ratably, on or before the 17th day of September, 1896, and made a demand upon each and every one of said shareholders for one hundred dollars ($100) on each and every share of the capital stock of said corporation held or owned by them respectively at the time of its failure.

61 4.

That the said deputy Comptroller of the Currency, by written order, dated seventeenth day of August, 1896, and under his seal of office, directed this plaintiff as said receiver to take all necessary proceedings by suit or otherwise to enforce the liability of the said stockholders to the extent of one hundred dollars ($100) upon each and every share of the said capital stock held or owned by them respectively at the date of the suspension of said bank.

5.

That at the date of the failure of said bank, the defendant, A. F. McClaine, was the owner of twenty-five (25) shares of the capital stock of said bank, of the par value of one hundred dollars ($100) per share, and the same stood in his name as such owner upon the books of the said association at said time, and said defendant is now and ever since has been the owner of the same; and said defendant has had notice of the foregoing order of the said deputy Comptroller of the Currency.

6.

That this plaintiff duly demanded of the said defendant, A. F. McClaine, the payment of said assessment upon the said stock, and said defendant was notified that in the event such payment was not made on or before the 17th day of September, 1896, suit would be commenced to enforce the payment thereof.

7.

That the said defendants are residents and citizens of the aforesaid district of Washington, and western division thereof,
62 being citizens and residents of the city of Tacoma, Pierce county, Washington.

8.

That at the time said defendant, A. F. McClaine, subscribed and secured the said shares of stock of said banking association and now and ever since said date, he and the defendant, Mae U. McClaine, were husband and wife, and that said subscription and said ownership of said stock was and is for the benefit of the community then existing between said A. F. McClaine and Mae U. McClaine, his wife, and was made by the husband in the prosecution of the community business.

9.

That plaintiff did subsequently to the 17th day of September, 1896, begin an action against said defendants on the said claim, in the superior court of the State of Washington, for Pierce county, being case No. 16,663 in said court, and that subsequently to the bringing of said action the said defendant A. F. McClaine, made a written proposition to said plaintiff to settle said claim, upon the following terms, to wit:

That the said defendant, would pay $200 thereon, and that said action be dismissed, and he would then pay the balance as follows:

$425.....May 1st, 1897.
$625.....August 1st, 1897.
$625.....November 1st, 1897.
$625.....February 1st, 1898.

And said proposition was duly accepted by plaintiff.

63 10.

That the said defendant made the first payment of $200 thereon on or about the 20th day of April, 1897, and also a further payment of $200 on or about the 21st day of May, 1897; but has wholly failed to make any other or further payments on said settlement.

11.

That said action was duly dismissed on the 10th day of March, 1898, and is no longer pending against said defendants; that this

plaintiff was duly authorized to make the said settlement with the said defendant by the Comptroller of the Currency.

Therefore the plaintiff prays for judgment against the said A. F. McClaine in the sum of twenty-one hundred dollars ($2100), with interest on $225 thereof from May 1st, 1897, on $625 thereof from August 1st, 1897, on $625 thereof from November 1st 1897, and on $625 thereof from February 1st, 1898, at the rate of seven (7) per cent per annum, and for his costs and disbursements herein, and that the judgment herein be declared a charge upon the community property of the said A. F. McClaine and Mae U. McClaine.

BONEY & HOYT,
Attorneys for Plaintiff.

Office and P. O. address, No. 526 the Rookery, Spokane, Washington.

HUDSON & HOLT,
Attorneys for Plaintiff.

Office and P. O. address, No. 403–4–5 Berlin building, Tacoma, Washington.

64 In the Circuit Court of the United States for the District of Washington, Western Division.

JOSEPH G. HEIM, as Receiver of the First National Bank of South Bend, Washington, Plaintiff,
vs.
A. F. MCCLAINE and MAE U. MCCLAINE, His Wife, Defendants. } No. 588.

Separate Amended Answer of A. F. McClaine.

Comes now the defendant, A. F. McClaine and for his separate answer to the complaint herein, saving all rights herein, says:

I.

He admits the allegations of paragraph 1 of said complaint.

II.

He admits the allegations of paragraph 2 of said complaint.

III.

He admits the allegations of paragraph 3 of said complaint.

IV.

He admits the allegations of paragraph 4 of said complaint.

65

V.

He admits the allegations of paragraph 5 of said complaint.

VI.

He admits the allegations of paragraph 6 of said complaint.

VII.

He admits the allegations of paragraph 7 of said complaint.

VIII.

He denies the allegations of paragraph 8 of said complaint, except that he admits that at the time he subscribed for and secured said stock in said banking association, and now, and ever since said date he and the defendant, Mae U. McClaine, were and are husband and wife.

IX.

He admits that the plaintiff did, as alleged in paragraph 9 of said complaint, subsequently to the 17th day of September, 1896, begin an action against said defendants on the said claim, in the superior court of the State of Washington, for Pierce county, and that subsequently to the bringing of said action, this answering defendant made a written proposition, and that said proposition was accepted by said plaintiff; but he denies each and every other allegation in said paragraph 9.

X.

He denies the allegations of paragraph 10 of said complaint.

66

XI.

He admits the allegations of paragraph 11 of said complaint, except that said action was duly dismissed on the 10th day of March, 1898, and is no longer pending against said defendants, which he denies.

And for a first separate and affirmative defense to the allegations of said complaint, this defendant alleges as follows, to wit:

I.

That on or about the 5th day of April, 1897, the plaintiff herein brought an action in the superior court of the State of Washington for Pierce county, against the defendants herein upon account of the assessment or alleged assessment set forth in the complaint herein, by serving upon said defendants a copy of the original summons and complaint in said action.

II.

That on or about the 8th day of April, 1897, and before the original summons and complaint in said action had been filed with the

clerk of said court, this defendant, by way of compromise, made a certain proposal in writing to said plaintiff for the dismissal of said action, as follows, to wit: That in consideration of the immediate dismissal of said action this defendant would sell and deed to said plaintiff, those certain premises known and described as lots 3 and 4, block 37, corrected plat of South Bend, at the agreed price of $415.83, the sum of $215.83 thereof to be applied in payment of another claim held by said plaintiff (amounting to said sum of $215.83,
67 and the sum of $200 thereof to be credited upon said stock as assessment (the same being the stock assessment referred to in the complaint herein), and thereafter said proposition was duly accepted by said plaintiff.

III.

That on or about the 29th day of April, 1897, this defendant relying upon the good faith and honesty of said plaintiff, and believing that he would faithfully carry out said agreement, did make, execute and deliver to said plaintiff the deed as aforesaid to said premises, and said plaintiff did accept said deed, and has ever since had the use and benefit of said premises.

IV.

That contrary to said agreement and in violation thereof, the said plaintiff did not dismiss said action, but did subsequently, to wit, on the 30th day of December, 1897, file the original of said summons and complaint, with the clerk of said court, and did apply for and obtain a default against said defendants and did apply for and obtain a judgment against said defendants, according to the prayer of the complaint.

V.

That said default and judgment was taken without any notice to this defendant; that immediately upon learning that said judgment had been entered as aforesaid, this defendant did apply for the vacation thereof, and for leave to appear and defend against said action and that plaintiff was duly served with a notice of said application, and did appear before said court and did resist said applica-
68 tion upon the merits thereof; and said court on the 21st day of February, 1898, after hearing the evidence produced by both parties upon the merits of said application and the argument of counsel thereon, and being fully advised, did find that the entering of said judgment was contrary to agreement and in violation thereof, and did order said judgment vacated and set aside and declared of no effect and void.

VI.

That the full and fair value of the premises hereinbefore de-cribed, at the time of the agreement hereinbefore referred to, was the sum of twelve hundred dollars.

VII.

That on account of said wrongful taking and entering of said judgment, this defendant was compelled to expend in attorneys' fees the sum of one hundred dollars.

VIII.

That by reason of the violation of said agreement as aforesaid and of the loss of the fair and reasonable value of said premises as aforesaid and of the expenditure on account of attorneys' fees as aforesaid, the purpose and effect of said compromise was wholly lost to this defendant and he was and is injured thereby in the sum of thirteen hundred dollars.

And as a second separate and affirmative defense to the allegations of said complaint, answering, defendant alleges as follows:

That the plaintiff is not now the owner and holder of said
69 alleged claim set forth in the complaint herein, and was not such owner at the time this action was brought; but that he has assigned all his interest in the same, for a valuable consideration, and is not the real party in interest herein.

Wherefore, answering defendant prays:

1. That he be dismissed hence without day.

2. That the defendant do have and recover judgment against the plaintiff, as damages in the sum of thirteen hundred dollars ($1300), and that an order of this court do issue to said receiver directing him to withhold from sale and disposition the premises hereinabove described, subject to the further order of this court.

For such other and further relief as to the court shall seem equitable and just.

T. O. ABBOTT,
Attorney for Defendant, 520–21 *Fidelity Building, Tacoma, Washington.*

STATE OF WASHINGTON, } ss:
County of Pierce, }

A. F. McClaine, being first duly sworn, does on oath depose and say that he is one of the defendants in the foregoing entitled action; that he has read the foregoing answer knows the contents thereof and believes the same to be true.

A. F. McCLAINE.

Subscribed and sworn to before me this 3d day of Jan. 1890.

_____,
Notary Public Residing at Tacoma, Pierce County, Wash.

70 In the Circuit Court of the United States for the District o
Washington, Western Division.

JOSEPH G. HEIM, as Receiver of the First National Bank of South Bend, Washington, Plaintiff,
vs.
A. F. MCCLAINE and MAE U. MCCLAINE, His Wife, Defendants.
No. 588

Motion.

Now come Hudson & Holt, attorneys for the plaintiff in the above entitled action, and move the court for an order substituting the name of J. Frank Aldrich for the name of Joseph G. Heim, plaintiff in this action, and for an order reviving said action in the name of the said J. Frank Aldrich, as receiver of the First National Bank of South Bend, Washington, which motion is based upon the certificate of the deputy and acting Comptroller of the Currency of the United States.

HUDSON & HOLT,
Attorneys for Plaintiff.

71 In the Circuit Court of the United States for the District of
Washington, Western Division.

JOSEPH G. HEIM, as Receiver of the First National Bank of South Bend, Washington, Plaintiff,
vs.
A. F. MCCLAINE and MAE U. MCCLAINE, His Wife, Defendants.
No. 588.

Order.

On motion of Hudson & Holt, attorneys for the plaintiff in this action, for leave to substiute the name of J. Frank Aldrich, as receiver of the First National Bank of South Bend, Washington, in the place of Joseph G. Heim, the plaintiff in this action, and to revive the said action in the name of said J. Frank Aldrich; and the court being satisfied from the showing made that the said Joseph G. Heim has resigned his office of receiver of the First National Bank of South Bend, Washington, and that his resignation has been accepted, and that J. Frank Aldrich has been duly appointed his successor as such receiver, and is now such receiver; it is therefore,

Ordered that the name of J. Frank Aldrich be substituted as plaintiff in this action for that of Joseph G. Heim, and that said action be revived in the name of said J. Frank Aldrich as receiver of
72 the First National Bank of South Bend, Washington, as plaintiff in this action; and that said action be proceeded with

under the style of J. Frank Aldrich, as receiver of the First National Bank of South Bend, Washington, plaintiff, *vs.* A. F. McClaine and Mae U. McClaine, his wife, defendants.

Ordered this the — day of February, 1899.

—— ——, *Judge.*

In the Circuit Court of the United States for the District of Washington, Western Division.

J. Frank Aldrich (Substituted Plaintiff for Joseph G. Heim), as Receiver of the First National Bank of South Bend, Washington, Plaintiff,
vs.
A. F. McClaine and Mae U. McClaine, His Wife, Defendants. } No. 588.

Amended Reply to the Separate Answer of Defendant A. F. McClaine.

Now comes the plaintiff in this action, and for amended reply to the first separate and affirmative defense in the answer of the said defendant, A. F. McClaine, alleges as follows:

1. He admits the allegations contained in paragraph one.

73 2. He denies each and every the allegations contained in paragraph two, except the fact that a proposition of compromise was made by the said defendant on or about the date named, and that two hundred dollars was to be paid on the settlement proposed by conveyance of real estate.

3. He denies each and every the allegations contained in paragraph three, except the execution of the deed, and that the plaintiff has been in possession of the said premises conveyed by said deed.

4. He admits the allegations contained in paragraph four.

5. He admits the allegations contained in paragraph five, except the allegation that said default and judgment were taken without any notice to the said defendant.

6. He denies the allegations contained in paragraph six.

7. He denies the allegations contained in paragraph seven.

8. He denies the allegations contained in paragraph eight.

And for a further reply to the allegations contained in the second separate and affirmative defense of said answer, plaintiff alleges and says:

1. He denies each and every the allegations contained in said second separate and affirmative defense.

Wherefore, plaintiff demands judgment as prayed for in the complaint herein.

HUDSON & HOLT,
Attorneys for Plaintiff.

74 STATE OF WASHINGTON, } ss:
County of Pierce, }

R. G. Hudson, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action; that he has read the foregoing amended reply and knows the contents thereof, and that he believes the same to be true.

That he makes this affidavit because the plaintiff is now absent from the said county and State.

R. G. HUDSON.

Subscribed and sworn to before me this 28th day of June, 1899.

[NOTARIAL SEAL.] R. S. HOLT,
Notary Public in and for said State,
Residence at Tacoma, in said County.

In the Circuit Court of the United States for the District of Washington, Western Division.

J. FRANK ALDRICH (Substituted Plaintiff for Joseph G. Heim), as Receiver of the First National Bank of South Bend, Washington, Plaintiff,
vs.
A. F. McCLAINE and MAE U. McCLAINE, His Wife, Defendants. } No. 588.

Journal Entry.

(July 26, 1899.)

75 This cause came on regularly for hearing at this time upon motion of defendants for judgment upon the pleadings. Mr. R. G. Hudson appearing for the plaintiff and Mr. T. O. Abbott on behalf of the defendants, and was argued by counsel and the court being fully advised in the premises ordered that said motion be and the same is hereby denied. To which ruling defendants except and their exception is allowed.

Thereupon a jury having been waived, the cause was duly submitted to the court, and thereafter the plaintiff moves the court for a voluntary nonsuit herein, and the court being duly advised, in the premises, orders that said motion be and the same is hereby granted.

DEFENDANT'S EXHIBIT "C."

(Title of Court and Cause.)

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys, that the annexed is a true and correct copy of the original letters therein referred to and set out.

HUDSON & HOLT,
Attorneys for Plaintiff.
T. O. ABBOTT,
Attorney for Defendant.

TACOMA, WASH., *April 8th*, 1897.

Joseph G. Heim, Esq., receiver, South Bend, W'n.

DEAR SIR: Regarding the assessment of 100 % upon the stock held by me in the First National Bank, of South Bend, I have
76 the following proposition to submit as to the payment of the amount $2,500 and the overdraft account of J. W. Morgan:

I will sell and deed to you lots Nos. 3 & 4, block 27, corrected plat of South Bend, in payment of the amount of the overdraft above mentioned, to wit, $215.83, and $200 additional to be credited upon my stock assessment; you to dismiss the suit brought against myself and wife, and I make the following proposition as to the payment of the balance: I will pay on May 1st, 1897, $425, on August 1st, 1897, $625, on November 1st, 1897, $625, and on February 1st, 1898, $625.

This I think you will admit is a favorable proposition under the circumstances, and owing to the financial condition existing here I find myself unable to complete these payments in any shorter period. Kindly advise me as early as possible in relation to the above.

Very truly yours, A. F. McCLAINE.

SOUTH BEND, WASH., *April 22nd*, 1897.

Mr. A. F. McClaine, Tacoma, Wash.

DEAR SIR: Yours of the 16th is at hand. Herewith I enclose you deeds for lots 4 & 5, of block 27, corrected plat of South Bend, Wash., for you and your wife to sign. Upon the return to me of the deed properly executed, and the receipt of $425.00 by May 1st. next I will send you a receipt for the Morgan overdraft and give you credit for $625.00 upon your assessment, and will make a recommendation to the comptroller that your proposition of 4-8-97 be accepted, and will instruct my attorneys to hold in abeyance, or dismiss the suit.

77 If the proposition is not accepted by the comptroller, I will return you the deed unrecorded, also, the money,—$425.00.

Your proposition having been made good by the first payment will undoubtedly have great weight with the comptroller in determining him to accept the proposition.

Very truly, JOSEPH G. HEIM, *Receiver.*

TACOMA, WASH., *April* 29, 1897.

Joseph G. Heim, Esq., So. Bend, W'n.

DEAR SIR: Herein deed to lots 4 & 5 bl'k. corrected plat of So. Bend as per our arrangement verbal and my proposition of Apr. 8–97. As this has been delayed so much I will not now be able to complete 1st payment until May 10–1897 as I have had to use some of my funds in another direction. I hope this will be satisfactory.

Yours truly, A. F. McCLAINE.

TACOMA, WASH., *May* 2, 1897.

Joseph G. Heim, recvr., So. Bend, Wash.

DEAR SIR: Herein my ck. No. 7 for $200—on acc't of payment due May 10th. Will be able to remit balance shortly. Have only just returned from Oregon and find your letter *re* safe here. Will forward same to my parties & ask for instructions.

Yours truly, A. F. McCLAINE.

78 SOUTH BEND, WASH., *July* 19, 1897.

Mr. A. F. McClaine, Tacoma, Wash.

DEAR SIR: I have just returned home from a trip east whither I was recently summoned, and was disappointed to find that you had not yet completed the payment of the first 25% stock assessment. It is very unsatisfactory to make such slow progress, for I want to get the affairs of the bank closed up as soon as possible, but can't do it while these matters are pending. I hope to have a remittance from you for the balance of the first installment as soon as you can send it.

Very truly, JOSEPH G. HEIM, *Receiver.*

TACOMA, WASHINGTON, *July* 23, 1897.

Jos. G. Heim, Esq., receiver, South Bend, Wash.

DEAR SIR: Mr. McClaine has referred to me, as his attorney, your letter of 19th relative to the assessment against him.

Since making the arrangement with you, the situation has very materially changed with Mr. McC. so that he is not able to carry out the same. Unless you can see your way clear to accept a cash compromise of the claim, he will be unable to do anything further in the matter in justice to other more equitable and pressing obligations. I think a fair adjustment would be largely for the benefit of

your trust, as a suit and judgment would not avail you anything at present.

If you think favorably of cash compromise of the matter on
79 a fair basis I will come down to see you at the earliest date possible and if an agreement can be reached a settlement can *be made at once.*

Awaiting your early reply, I am,
Yours, etc., T. O. ABBOTT.

SOUTH BEND, WASH., *July 27th*, 1897.

Mr. T. O. Abbott, Tacoma, Wash.

DEAR SIR: Yours of the 23rd in the matter of the assessment against stock in the First National Bank of South Bend owned by Mr. A. F. McClaine, is at hand and contents noted. Mr. McClaine and I compromised this matter once, I accepting the terms proposed by himself after having submitted it to the comptroller for his sanction, and I doubt that I would now be justified in accepting anything less. I do not know what you might consider a fair basis of settlement. I would consider the payment of the principal, the interest being remitted, a fair settlement; so that if you differ widely from that we would probably not reach conclusions together.

What do you consider a fair basis of settlement? It would be well for us to have some idea of whether we could come together at all before your being at the expense of a trip here in the matter.

Very truly, JOSEPH G. HEIM, *Receiver.*

TACOMA, WASH., *July* 31, 1897.

Joseph G. Heim, Esq., South Bend, Wash.

DEAR SIR: Replying to yours of 27th instant relative to the McClaine assessment, I note what you say about having com-
80 promised the matter formerly with Mr. McC. and your suggestion of payment of principal, the interest being remitted, as a fair settlement. Since the former arrangement the situation has very materially changed with Mr. McC. and he is not now in a position to carry out that arrangement, nor such a one as you now suggest. If this were the only matter requiring his attention the difficulty would not be so great, but it is now a question of what he can do and not what he wishes to do or ought to do. Other settlements have been made and are in process on a basis of 25 % and we think under the circumstances that would be a fair settlement in your case.

You will of course understand that obligations such as these do not have the same moral status that those of a more direct character do, and that Mr. McC. would not be justified in making a preference in this instance. Therefore, while the amount proposed may not seem fair to you, it must be borne in mind that a compromise would be a yielding on both sides and not on one alone. Mr. McC. has already attempted in good faith to carry out his former arrangement.

The question now is, is a suit and judgment likely to serve the trust better than a cash settlement such as proposed? I know that your own good business sense and knowledge of the result of like proceedings in other trusts will convince you that the latter course is best. If this meets your approbation I will come to see you.

Respectfully, T. O. ABBOTT.

81 SOUTH BEND, WASH., *Aug. 9th*, 1897.

Mr. T. O. Abbott, Tacoma, Wash.

DEAR SIR: Yours of 30th ult. in the McClaine matter is at hand. I could not recommend to the comptroller a settlement of Mr. McClaine's liability for so small a per cent. as is offered by you. I regret to say that if the offer contained in your letter is the best that Mr. McClaine can or will do, I will be compelled to proceed with the suit.

Very truly, JOSEPH G. HEIM, *Receiver.*

SILVERTON, OREGON, *Aug.* 25, 1897.

Joseph G. Heim, So. Bend, Wash.

DEAR SIR: I have not yet been able to make arrangements *so I can the* proposition that we talked of when I was in So. Bend, but I will make the following $350-cash. 350. Jan'y 10, '98 and $350 April 1st, 1898, making a total of $1050. If this meets with your approval will send you c'k for cash payment in few days.

Yours truly, A. F. McCLAINE.

SOUTH BEND, WASH., *Oct. 4th*, 1897.

Mr. A. F. McClaine, Tacoma, Wash.

DEAR SIR: Your letter of the — containing proposition of settlement of your indebtedness upon stock assessment at 50 per cent. of the balance due is received, and if you will send me a certified check for the first $350.00, I will recommend to the comptroller a settlement upon that basis, the $350.00 not to be applied on the
82 settlement until it is sanctioned by the comptroller, if the said settlement is not so sanctioned the $350.00 to be subject to your order.

Very truly, JOSEPH G. HEIM, *Receiver.*

TACOMA, WASHINGTON, *October 4th*, 1897.

Jos. Heim, Esq., receiver nat'l bank, South Bend, Wash.

DEAR SIR: I am advised by Mr. McClaine that he submitted a proposition to you some weeks since for adjustment of the assessment matter, about which I had some correspondence with you, and that he has had no answer from you touching the same. I desire to protect his interests in the matter, and if it is your purpose to reject his offer and press the suit, I wish to make defense, and I

therefore request that you will advise me of your conclusions in the matter at an early date.

Yours, etc., T. O. ABBOTT.

TACOMA, WASHINGTON, *October* 12, 1897.

Jos. G. Heim, Esq., receiver, South Bend, Wash.

DEAR SIR: Not having heard from you in regard to the McClaine assessment, I advised him, as his attorney, to withdraw the offer he made you, by reason of its non-acceptance, so that he would not be further embarrassed by the uncertainty of the matter. I have just received from him (he being east of the mountains) your letter of the 4th instant, wherein you advise him of the conditional acceptance of his offer, the condition requiring further serious delay.

83 In the present status of his affairs, and in order for him to adjust all matters satisfactorily, not only with you, but with others, uncertainty is very unwise, and I have therefore advised him to make you the following offer, to be accepted or rejected at once, to wit: In consideration of the immediate cancellation of the claim, he will pay $500.00 in cash, in full settlement thereof.

You doubtless have full authority to compromise the matter on this cash basis, without reference to Washington. It is important both for Mr. Mc.'s interest and your own that this proposition be accepted, and I ask you for a reply by return mail.

Yours, etc., T. O. ABBOTT.

SOUTH BEND, WASH., *Oct. 15th*, 1897.

Mr. A. F. McClaine, Tacoma, Wash.

DEAR SIR: Having no reply as yet to my last letter, I write you this note to inquire the reason of not having received the remittance of $350.00 as per last agreement of settlement. Of course, as you know, the settlement of you- indebtedness upon the basis of $1150.00 in three equal installments is only an offer, and if you are to take advantage of it, you must meet the payments promptly.

Let me hear from you.

Very truly, JOSEPH G. HEIM, *Receiver.*

SOUTH BEND, WASH., *Oct. 25th*, 1897.

Mr. T. O. Abbott, Tacoma, Wash.

DEAR SIR: On Oct. 15th, 1897, I wrote Mr. McClaine in
84 reference to the settlement of his indebtedness on stock assessment as we had agreed upon, but have not yet heard from him. In the meantime your letter comes, written before Mr. McClaine could have received mine, with another proposition, being less than the proposition made directly by Mr. McClaine himself. I do not yet understand that Mr. McClaine does not intend to stand by the agreement he made with me, which was 50 % of the balance

due, and which I recommended as a basis of settlement. Your offer is considerably less than any of the other stockholders have escaped with, and less than that for which Mr. McClaine has settled with other banks. I am awaiting a reply from Mr. McClaine to my last letter.

Very truly, JOSEPH G. HEIM, *Receiver.*

TACOMA, WASH., *Nov.* 2, 1897.

Joseph G. Heims, Esq., receiver, South Bend, Wash.

DEAR SIR: Yours of the 25th inst. relating to the McClaine assignment is at hand. I think you have forgotten some of the previous correspondence touching this matter.

The letter to which yours was the answer, stated that Mr. McC. had forwarded to me your letter of the 4th inst., wherein you notify him for the first time of your conditional acceptance of his offer, in which you stated that it will be necessary to secure the sanction of the comptroller.

85 In view of the fact that Mr. McC.'s proposition was made to you some months since and that you did not even conclude to submit the same to the comptroller, until so recent a date, caused me to advise him to withdraw the same for nonacceptance. Your proposition of the 4th inst. still leaves the matter open for an indefinite period, and as I informed you in my last letter he is not justified in allowing the matter to longer remain in an uncertain state.

Therefore the proposition which I submitted to you to pay five hundred dollars ($500.00) cash in full settlement of the claim was based upon the necessity of having the matter determined at once.

I also have from Mr. McC. your letter of October 15th, and the entire correspondence is before me, upon final consideration of the matter, I do not think it advisable for him to offer anything different from my proposition as above stated.

If you desire to accept this, the cash will be paid at once upon proper discharge of the obligation.

Mr. McC. has no disposition whatever, to go back on any agreement he has made with you, but the difficulty is that you have not signified your acceptance of any proposition submitted, until too late and then only conditional.

He has made no other settlements but other propositions are still pending and considering the fact that he has already made you one substantial payment upon this assessment, which added to the amount he now proposes to pay will be extremely fair under

86 all the circumstances, and I hope that you will favor me with an early reply accepting this proposition, so that the matter may be closed at once.

Yours respectfully, T. O. ABBOTT.

DEFENDANT'S IDENTIFICATION No. 1.

UNITED STATES OF AMERICA, }
State of Washington. }

In the Circuit Court of the United States for the District of Washington, Western Division.

In the Matter of the Application of JOSEPH G. HEIM, Receiver of the First National Bank of South Bend, Washington, for Authority to Compromise and Sell the Remaining Assets of said Bank in Liquidation.

Petition.

To the Honorable C. H. Hanford, judge of said court:

Your petitioner, Joseph G. Heim receiver of the First National Bank of South Bend, Washington, respectfully represents to your honor that heretofore and prior to the 10th day of August, A. D. 1895, the First National Bank of South Bend, Washington, aforesaid, was an association duly organized and existing under and by virtue of the laws of the United States regulating and concerning the existence of national banks, and was doing business as a national bank at said South Bend, Washington; that on said
87 tenth day of August, A. D. 1895, said bank failed and closed its doors, having on said date and theretofore committed acts of bankruptcy, and thereafter on the 17th day of August, 1895, the Comptroller of the Currency, having become satisfied of the insolvency of said association, appointed your petitioner receiver of said First National Bank of South Bend, Washington, and your petitioner thereupon duly qualified, entered upon the discharge of his duties as such receiver, took possession of the assets of said bank and ever since has been in possession thereof, and has been and is now administering the affairs of said trust.

Your petitioner further represents that there is now remaining in his hands a large amount of the assets of said trust, consisting of bills receivable, overdrafts, judgments, stocks, and securities, claims due upon the assessment of the capital stock of said bank, other personal and chattel property and evidences of indebtedness. That your petitioner has, after exhausting all means of collection, been unable to realize upon said assets, which your petitioner is informed and believes are bad and doubtful assets.

Your petitioner further represents that a considerable sum can be realized from such assets by compromising and compounding the same with the debtors or by private sale thereof.

Your petitioner further represents that said bank had, prior to suspension, and the trust has subsequent thereto, through its re-

ceiver, in the administration of the affairs thereof, acquired
88 title to and interest in certain lots and tracts of real estate
located and being in the county of Pacific, State of Washington, and your petitioner believes it to be to the best interest of said trust that such real estate be sold for cash privately or at public auction, and, if sold publicly, after giving due notice of such sale according to law, which said real estate is more particularly known and described as follows:

Lot 10, block 19; lots 3 and 4, block 27; lot 8, block 32; lot 6, block 35, corrected plat of South Bend, Washington. Lot 16, block 40, South Bend Land Company's second addition to South Bend, Washington. Lots 2 and 8 of sec. 28 of township 14, N. R. 9 W., W. M. except 15 acres off south side of said lot 8. Southwest quarter, sec. 32, township 14, N. R. 9 W. M. And lot 16, block 20, South Bend addition to South Bend, Washington.

Your petitioner further represents that an examination of the condition of the affairs of said receivership has been made by a special national bank examiner, under the authority and direction of Hon. James H. Eckels, Comptroller of the Currency and that all of the remaining assets of said trust are bad and doubtful, and it is the desire of the said Comptroller of the Currency that said receivership be closed at an early date, and that said comptroller has directed and authorized your petitioner to apply to this honorable court for an order authorizing and empowering your petitioner as such receiver, to compromise and compound or sell at private sale all of the assets of said trust and to sell at public sale all of the remaining assets thereof, except such as may be compounded or sold at private sale for cash, after duly advertising the sale at public
auction pursuant to law.

89 Your petitioner therefore prays this honorable court for an order authorizing, empowering, and directing him, as such receiver, to compromise and compound or sell at private sale all of the assets of the said First National Bank of South Bend Washington, now in his hands, as receiver aforesaid, for cash, for such sum or sums as in his judgment is to the best interest of his said trust, and to sell at public sale all of the assets not so compounded or sold at private sale, for cash; after duly advertising the same according to law.

And your petitioner further prays for such other and further order in the premises as to your honor may seem meet, etc.

JOSEPH G. HEIM,
Receiver First National Bank, South Bend, Washington.

STATE OF WASHINGTON, } ss:
County of Thurston, }

Joseph G. Heim, being first duly sworn on oath, says: That he is a receiver of the First National Bank of South Bend Washington; that he has read the foregoing petition, knows the contents thereof,

and that the same is true in substance and fact, as he verily believes.

JOSEPH G. HEIM.

Subscribed and sworn to before me this 30th day of September, A. D. 1897.

[Seal of Notary Public, C. J. Lord.]

C. J. LORD,
Notary Public in and for the State of Washington, Residing at Olympia.

90 THE UNITED STATES OF AMERICA, }
State of Washington, }

In the Circuit Court of the United States for the District of Washington, Western Division.

In the Matter of the Application of JOSEPH G. HEIM, Receiver of the First National Bank of South Bend, Washington, for Authority to Compromise and Sell the Remaining Assets of said Bank in Liquidation.

Order.

Upon reading the petition of Joseph G. Heim, receiver of the First National Bank of South Bend, Washington, duly verified on the 30th day of September, A. D. 1897, in the matter of the compromise and sale of the assets of said bank, in liquidation, and being fully advised in the premises, the court doth hereby order, adjudge, and decree that said Joseph G. Heim as receiver aforesaid, be and he is hereby authorized to compromise and compound or sell at private sale all of the assets of said bank, consisting of bills receivable, judgments, overdrafts, stocks and securities, claims due upon assessment of the capital stock of said bank, other personal and chattel property and evidences of indebtedness, and real estate, for cash, for such sum or sums as he as such receiver may be able to obtain and is in his judgment to the best interest of his said trust, and sell at public sale all of the remaining assets of said trust not so compromised or
91 sold at private sale, together with the real estate described in said petition, not sold privately, namely:

Lot 10, block 19; lots 3 and 4, block 27; lot 8, block 32; lot 6, block 35, corrected plat of South Bend, Washington.

Lot 16, block 40, South Bend Land Company's second addition to South Bend, Washington.

Lots 2 and 8 of section 28 of township 14, N. R. 9 W.; W. M., except 15 acres off south side of said lot 8.

Southwest quarter, section 32, township 14, N. R. 9 W., W. M.

Lot 16, block 20, South Bend addition to South Bend, Washington.

The sale at public auction to be made in the manner hereinafter provided, for cash, and the said receiver to execute and deliver to the purchasers of said property at private or public sale such deeds, conveyances, assignments and transfers as may be proper, upon payment to him of the amount for which the same is sold at private or public sale.

And the said receiver is further authorized and empowered to do any other act or thing which may be necessary to fully carry out the conditions and purposes of this order.

The court further orders that the receiver sell the said assets of said bank, if sold publicly, at the courthouse door in the city of South Bend, the county seat of Pacific county, Washington, at the lawful hour prescribed by statute, and that due notice of such sale at public auction be made by publication of the time, place,
92 and terms thereof in a newspaper published in the city of South Bend, for four successive weeks said notice of publication to contain a general statement of the personal property and a description in detail of the real estate so offered for sale, and the receiver will also mail circular copies of such notice, together with schedule in detail of all of the assets to be sold, to each of the creditors and shareholders of said bank, and post like notices in at least five of the most public places in the city of South Bend.

Dated this 6th day of October, A. D. 1897.

C. H. HANFORD,
Judge of said Court.

UNITED STATES OF AMERICA, }
District of Washington, } ss:

I, A. Reeves Ayres, clerk of the circuit court of the United States for the district of Washington, do hereby certify the foregoing to be a full, true, and correct copy of the petition and order filed in the within entitled matter, as the same remains on file in said court, at Tacoma, in said district.

Witness my hand and the seal of said circuit court, the twentieth day of November, 1901.

[SEAL OF THE COURT.] A. REEVES AYRES, *Clerk,*
By SAM'L D. BRIDGES,
Deputy Clerk.

92½ *Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.*

93 At a stated term, to wit: the October term A. D. 1901 of the United States circuit court of appeals for the ninth circuit, held at the court room, in the city and county of San Francisco, on Wednesday the tenth day of September in the year of our Lord one thousand, nine hundred and two.

Present: The Honorable William B. Gilbert, circuit judge, Hon-

orable Erskine M. Ross, circuit judge, Honorable William W. Morrow, circuit judge.

ADOLPHUS F. McCLAINE, Plaintiff in Error,
v.
J. FRANK ALDRICH, as Receiver of the First National Bank of South Bend, Defendant in Error. } No. 793.

Order of Substitution.

It appearing to the satisfaction of the court that J. Frank Aldrich has since the prosecution of the writ of error in this cause, resigned his position as receiver of the First National Bank of South Bend, Washington, and that George C. Rankin has been duly appointed his successor and is now the duly acting receiver of said bank, on application of Messrs. Hudson & Holt, attorneys for the defendant in error in the aforesaid cause, to have said Rankin substituted for the said Aldrich in all respects as a party to said cause.

It is therefore ordered that said Rankin be, and he is hereby, substituted for and in the place and stead of said Aldrich in this cause in all respects in which said Aldrich appears therein.

Ordered, in open court in the presence of counsel for both parties this 10th day of September, 1902.

94 At a stated term, to wit: the October term A. D. 1901 of the United States circuit court of appeals for the ninth circuit, held at the court room, in the city and county of San Francisco, on Wednesday the tenth day of September in the year of our Lord one thousand, nine hundred and two.

Present: The Honorable William B. Gilbert, circuit judge, Honorable Erskine M. Ross, circuit judge, Honorable William W. Morrow, circuit judge.

ADOLPHUS F. McCLAINE, Plaintiff in Error,
v.
GEORGE C. RANKIN, Successor to and Substituted for J. Frank Aldrich, as Receiver of the First National Bank of South Bend, Defendant in Error. } No. 793.

Order of Submission.

Ordered, cause argued by T. O. Abbott, Esquire, counsel for the plaintiff in error, and R. G. Hudson, Esquire, counsel for the defendant in error, and submitted to the court for consideration and decision.

95 In the United States Circuit Court of Appeals for the Ninth Circuit.

ADOLPHUS G. MCCLAINE, Plaintiff in Error,
v.
GEORGE C. RANKIN, as Successor to and Substituted for J. Frank Aldrich, as Receiver of the First National Bank of South Bend, Defendant in Error.

In error to the circuit court of the United States for the district of Washington, western division.

T. O. Abbott, attorney for plaintiff in error.
Robert G. Hudson and Robert S. Holt, attorneys for defendant in error.

Before Gilbert, Ross, and Morrow, circuit judges.

GILBERT, circuit judge, delivered the opinion of the court.

The receiver of the First National Bank of South Bend, Washington, brought an action against the plaintiff in error as a stockholder of said bank to recover a delinquent assessment. The cause was tried before the court without a jury, and judgment was rendered against the plaintiff in error for the sum of $2300, with interest and costs.

The plaintiff in error assigns as error that the circuit court overruled his demurrer to the complaint. It is contended that the complaint fails to state a cause of action, for the reason that it does not show the total amount of the capital stock of the insolvent
96 bank. We think the complaint is sufficient. While it does not in direct terms state the total amount of the capital stock, it sets forth facts from which it may be inferred. It alleges that the total assessment upon the shareholders was $50,000; that it was made ratably; that the assessment was $100 upon each share; that there were 500 shares, and that their par value was $100 each. From these averments it is plain that the capital stock was $50,000.

It is assigned as error that the court sustained the demurrer of the receiver to the first affirmative defense of the answer of the plaintiff in error. In that defense it was alleged that on December 30, 1897, the former receiver of said bank had commenced an action against the plaintiff in error in the superior court of the State of Washington for the county of Pierce, to recover the same assessment, and that a judgment was rendered therein in favor of said receiver for the amount of $2300, which judgment, upon the application of the plaintiff in error, was subsequently vacated and set aside; and that thereafter, upon the application of the receiver, the action was dismissed without notice to the plaintiff in error and "without prejudice;" that thereafter, on the application of the plaintiff in error and with the consent of counsel for the receiver, the

words "without prejudice" were struck from the judgment entry. It is contended that the judgment so pleaded in such affirmative defense constituted a bar to the present action, for the reason that the dismissal was not without prejudice, and was so entered with the consent of the receiver. By the provisions of sections 409 and 411 of 2 Hill's Code of Washington, it will appear that such a judgment of dismissal has not the effect which is contended for by the plaintiff in error, and that it is no bar to another action for the same cause.

It is contended that the court erred in admitting in evidence a certain exhibit which purported to be a copy of a notice
97 served by the former receiver upon the plaintiff in error. The complaint had alleged a notice of the assessment and demand for its payment given and made to the plaintiff in error by the receiver, and this was denied by the answer. The receiver, to prove his cause of action, introduced the affidavit of Joseph G. Heim, the former receiver of said bank, together with the exhibit attached thereto. It was stipulated between the parties that the affidavit of Heim might stand in said cause for and as the testimony of said Heim in all respects as if it had been taken upon commission duly issued, or as if he were present in court, the plaintiff in error reserving an objection thereto on the ground or irrelevancy, immateriality, and incompetency only. It is contended now that the exhibit was incompetent testimony, for the reason that it was not the best evidence; that no notice or demand was served upon the plaintiff in error to produce the original notice, and that the copy, therefore, was secondary evidence. We do not find it necessary to consider this objection. It appears in the body of the affidavit that the affiant deposed to the fact that before the commencement of the action he made personal demand upon the plaintiff in error "for the payment of said assessment," and that the plaintiff in error admitted having received the notice and having knowledge thereof and of said demand. We think this was sufficient notice to and demand of the defendant in error, and that the admission of the exhibit, if it was error, was harmless.

It is contended that it affirmatively appears from the evidence that the receiver had no authority from the Comptroller of the Treasury to bring the present action. It is not denied that the record shows that there was originally authority to commence such an action, but it is contended that inasmuch as authority was given subsequently to compromise the demand or to sell the same,
98 it operated to retract the authority to sue. We think this assignment of error requires no extended discussion. The authority to bring the action was in no way curtailed or withdrawn by the authority to compromise or to sell the cause of action. The latter authority so given was a general power "to compromise and compound or sell at private sale all of the assets of said bank," including "claims due upon assessment of the capital stock." It was an authority entirely consistent with the specific authority pre-

viously given to bring suit. The receiver had the power to take either course so permitted by the comptroller.

It is contended, further, that the present action is barred by a second action which was brought for the purpose of enforcing the compromise which had been agreed upon between the receiver and the plaintiff in error at the time of the dismissal of the first action. It had been agreed as a compromise of said demand for said assessment that the plaintiff in error would convey to the receiver certain lots in South Bend, Washington, as a payment of the sum of $415.83, $215.83 whereof was to pay an account due to the bank from one Morgan, and the remaining $200 was to be credited to the plaintiff in error on the said assessment, and that thereafter the plaintiff in error would pay the remainder of his assessment in certain installments, all of which were to fall due within a year from the date of the compromise. It appeared that this agreement was not carried out by the plaintiff in error, except that he conveyed the lots to the receiver and received the stipulated credit therefor. In order to enforce the compromise the receiver brought the action upon the agreement, but before proceeding to judgment he took a voluntary nonsuit, which he had the right to do. We cannot see how that proceeding affects his power to prosecute the present action. The plaintiff in error failed to carry out his part of the agreement. The receiver has in the present action credited him with the $200
99 so paid on account. We find no error in the ruling of the trial court in denying to this agreement of compromise the effect of a bar to the present action.

Equally without merit is the contention that the court erred in denying the motion of plaintiff in error for a judgment at the close of the trial, upon the ground that by instituting proceedings in the second action to enforce the compromise the receiver had elected that remedy and had thereby waived his right to pursue another. There is no question here of the right of election. Election refers to a choice between different forms of action based upon the same facts. These two actions relate to different states of fact. The former was brought to enforce an agreement of compromise. The receiver took a nonsuit therein, possibly for the reason that, as the answer of the plaintiff in error in the present action alleges, the compromise agreement had never been authorized or ratified by the comptroller. But whatever may have been the reason, the receiver had the right to regard the compromise as abandoned, and to sue upon the assessment. He chose that course. He was not estopped to do so by reason of having instituted an action upon the compromise agreement.

It is contended that the liability of the plaintiff in error upon the assessment was satisfied by the payment of the $200 and the conveyance of the lots; that in taking the $200 the receiver became trustee for the plaintiff in error to secure the ratification of the proposal then submitted. This contention cannot be sustained. It is only necessary to advert to the fact already alluded to, that the plaintiff in error failed to carry out his agreement of compromise,

and that the receiver applied the $200, which had been paid him, on the assessment, and in the judgment gave the plaintiff in error credit therefor. It is argued in this connection that the lots
100 were of much greater value than $415.83 and that the receiver still retains the title to the lots. It must not be forgotten, however, that the lots were turned over at an agreed price, and that they were conveyed for a double purpose, first, to pay the debt of $215.83 owing by Morgan to the bank, and second, to pay $200 upon the assessment owing from the plaintiff in error.

We find no error in the record for which the judgment should be reversed. The judgment is affirmed.

(Endorsed:) Opinion. Filed Nov'r 10, 1902. F. D. Monckton, clerk.

101 United States Circuit Court of Appeals for the Ninth Circuit.

ADOLPHUS F. McCLAINE, Plaintiff in Error,
vs.
GEORGE C. RANKIN, as Successor to and Substituted for J. Frank Aldrich, Receiver of the First National Bank of South Bend, Defendant in Error. } No. 793. Judgment.

In error to the circuit court of the United States for the district of Washington, western division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Washington, western division, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed, with costs.

(Endorsed:) Judgment. Filed and entered Nov. 10, 1902. F. D. Monckton, clerk.

102 At a stated term, to wit: the October term A. D. 1902 of the United States circuit court of appeals for the ninth circuit, held at the court room, in the city and county of San Francisco, on Monday the ninth day of March in the year of our Lord one thousand, nine hundred and three.

Present: The Honorable William B. Gilbert, circuit judge, Honorable Erskine M. Ross, circuit judge, Honorable William W. Morrow, circuit judge.

ADOLPHUS F. McCLAINE, Plaintiff in Error,
v.
GEORGE C. RANKIN, Successor to and Substituted for J. Frank Aldrich, as Receiver of the First National Bank of South Bend, Defendant in Error. } No. 793.

Order Denying Petition for a Rehearing.

Ordered, petition for a rehearing, hereto filed herein, denied.

103 In the Supreme Court of the United States.

ADOLPHUS F. McCLAINE, Plaintiff in Error,
vs.
GEORGE C. RANKINS, as Receiver of the First National Bank of South Bend, Washington, Defendant in Error. } Petition for Writ of Error.

To the honorable the Supreme Court of the United States:

Now comes Adolphus F. McClaine, plaintiff in error, in the above entitled cause and represents and alleges that on the 10th day of November, 1903, the circuit court of appeals for the ninth circuit made and entered a judgment in the above entitled cause in favor of George C. Rankin as receiver of the First National Bank of South Bend, Washington, defendant in error, and against Adolphus F. McClaine, plaintiff in error for the affirmance of the judgment of the United States circuit court for the district of Washington, western division, in said cause, and your petitioner further represents and alleges that there is manifest error in the record and proceedings in said circuit court of appeals in the following particulars, to wit:—

1.

That by the record aforesaid it appears that the demurrer of the plaintiff in error to the complaint of the defendant in error was overruled by the United States circuit court for the district of Washington, western division, and that its judgment in overruling said demurrer was affirmed by said circuit court of appeals whereas the said demurrer should have been sustained, and the said judgment
104 of said circuit court should have been reversed by said circuit court of appeals for error in overruling said demurrer.

2.

That by the record aforesaid it appears that the demurrer of the defendant in error to the first affirmative defense set forth in the amended answer of the plaintiff in error was sustained by the United States circuit court for the district of Washington, western division,

and that its judgment in overruling said demurrer was affirmed by said circuit court of appeals whereas the said demurrer should have been overruled and the said judgment of said circuit court should have been reversed by said circuit court of appeals for error in sustaining said demurrer.

3.

That by the record aforesaid it appears that the United States circuit court for the district of Washington, western division, sustained the motion of defendant in error to strike paragraphs six, eight, nine, ten and eleven of the second affirmative defense contained in the amended answer of plaintiff in error to the complaint of the defendant in error, and that its judgment in sustaining said motion was affirmed by said circuit court of appeals whereas said motion should have been denied and said judgment of said circuit court should have been reversed by said circuit court of appeals for error in sustaining said motion.

4.

That by the record aforesaid it appears that on the trial of said cause in the United States circuit court for the district of Washington, western division, said circuit court admitted in evidence over the objection of plaintiff in error a certain affidavit of one Joseph G. Heim together with a stipulation appended thereto which was
105 marked "Plaintiff's Exhibit B" whereas the objection of plaintiff in error should have been sustained by said circuit court and the said circuit court of appeals should have reversed the said judgment of said circuit court because of error in admission of said evidence.

5.

That by the record aforesaid it appears that on the trial of said action in the United States circuit court for the district of Washington, western division that the motion of plaintiff in error for a nonsuit was denied by said circuit court and the judgment in denying said motion was affirmed by said circuit court of appeals whereas said circuit court should have granted said motion, and said circuit court of appeals should have reversed the said judgment of said circuit court for error in denying said motion.

6.

That by the record aforesaid it appears that upon the trial of said cause in the United States circuit court for the district of Washington, western division, said circuit court sustained the objection of defendant in error to the admission in evidence of certain documents marked "Defendant's Identification No. 1" and "Defendant's Identification No. 2" and its judgment in sustaining said objection was affirmed by said circuit court of appeals whereas said circuit court should have overruled said objections and the said circuit

court of appeals should have reversed the said judgment of said circuit court for error in sustaining said objection.

7.

That by the record aforesaid it appears that on the trial of said cause in the United States circuit court for the district of Washington, western division, that said circuit court denied the motion
106 of plaintiff in error for judgment and directed judgment to be entered in favor of defendant in error and that the said circuit court of appeals affirmed the judgment of said circuit court in denying said motion and directing judgment to be entered in favor of defendant in error whereas the said circuit court should have granted the motion of plaintiff in error, and said circuit court of appeals should have reversed said judgment of said court for error in denying said motion for judgment and in directing judgment to be entered in favor of the defendant in error.

8.

That by the record aforesaid it appears that the United States circuit court for the district of Washington, western division, entered certain findings of fact and conclusions of law offered by the defendant in error, and refused to enter certain other findings of fact and conclusions of law offered by the plaintiff in error, and that said circuit court of appeals affirmed the judgment of said circuit court in entering said findings of fact and conclusions of law offered by the defendant in error, and refusing to enter findings of fact and conclusions of law offered by plaintiff in error whereas the said circuit court should have refused the findings of fact and conclusions of law offered by defendant in error and should have entered the findings of fact and conclusions of law offered by plaintiff in error, and said circuit court of appeals should have reversed said judgment of said court for error in entering findings of fact and conclusions of law offered by the defendant in error and in refusing to enter the findings of fact and conclusions of law of plaintiff in error.

9.

That by the record aforesaid it appears that the United States circuit court for the district of Washington, western division,
107 made and entered judgment in said cause in favor of defendant in error and against plaintiff in error in the sum of $3183.17 and, that the said circuit court of appeals affirmed the said judgment of said circuit court whereas the said circuit court should have made and entered judgment in favor of plaintiff in error and against defendant in error dismissing said action and for costs, and said circuit court of appeals should have reversed said judgment of said circuit court all of which error will more fully appear by the assignment of errors in the Supreme Court of the United States which is filed herewith.

Wherefore your petitioner prays that a writ of error may be allowed to the said circuit court of appeals for the ninth circuit whereby the said final judgment may be removed to the Supreme Court of the United States to be there reviewed and corrected, and that a citation may be issued to said George C. Rankin, as receiver of the First National Bank of South Bend, Washington, citing and admonishing him to be and appear at a Supreme Court of the United States next to be holden at the city of Washington there to show cause if any there be why the said judgment of said circuit court of appeals should not be corrected, and that the amount of the bond may be fixed which it will be necessary for your petitioner to give in order the execution may be stayed upon the said final judgment, and that such other process may be allowed as may enable your petitioner to obtain a review of the said final judgment of said circuit court of appeals and the correction of the said alleged errors by the Supreme Court of the United States.

T. O. ABBOTT,
Attorney for Petitioner.

(Endorsed:) Petition for writ of error. Filed April 15, 1903. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

108 In the Supreme Court of the United States.

ADOLPHUS F. MCCLAINE, Plaintiff in Error,
vs.
GEORGE C. RANKIN, as Receiver of the First National Bank of South Bend, Washington, Defendant in Error.
} Assignments of Error.

Now comes Adolphus F. McClaine, plaintiff in error, who was also plaintiff in error in the United States circuit court of appeals for the ninth circuit, and makes the following assignment of errors in the Supreme Court of the United States in the above entitled cause which is hereby removed from said circuit court of appeals by writ of error, and the plaintiff alleges that there is manifest error in the record and proceedings of said circuit court of appeals in the following particulars, to wit:—

1.

That by the record aforesaid it appears that the demurrer of the plaintiff in error to the complaint of the defendant in error was overruled by the United States circuit court for the district of Washington, western division, and that its judgment in overruling said demurrer was affirmed by said circuit court of appeals whereas the said demurrer should have been sustained, and the said judgment of said circuit court should have been reversed by said circuit court of appeals for error in overruling said demurrer.

2.

That by the record aforesaid it appears that the demurrer of the defendant in error to the first affirmative defense set forth in the amended answer of the plaintiff in error was sustained by
109 the United States circuit court for the district of Washington, western division, and that its judgment in overruling said demurrer was affirmed by said circuit court of appeals whereas the said demurrer should have been overruled and the said judgment of said circuit court should have been reversed by said circuit court of appeals for error in sustaining said demurrer.

3.

That by the record aforesaid it appears that the United States circuit court for the district of Washington, western division, sustained the motion of defendant in error to strike paragraphs, six, eight, nine, ten and eleven of the second affirmative defense contained in the amended answer of plaintiff in error to the complaint of the defendant in error, and that its judgment in sustaining said motion was affirmed by said circuit court of appeals whereas said motion should have been denied and said judgment of said circuit court should have been reversed by said circuit court of appeals for error in sustaining said motion.

4.

That by the record aforesaid it appears that on the trial of said cause in the United States circuit court for the district of Washington, western division, said circuit court admitted in evidence over the objection of plaintiff in error a certain affidavit of one Joseph G. Heim together with a stipulation appended thereto which was marked "Plaintiff's' Exhibit B" whereas the objection of plaintiff in error should have been sustained by said circuit court, and the said circuit court of appeals should have reversed the said judgment of said circuit court because of error in admission of said evidence.

110 5.

That by the record aforesaid it appears that on the trial of said action in the United States circuit court for the district of Washington, western division that the motion of plaintiff in error for a nonsuit was denied by said circuit court and the judgment in denying said motion was affirmed by said circuit court of appeals whereas said circuit court should have granted said motion, and said circuit court of appeals should have reversed the said judgment of said circuit court for error in denying said motion.

6.

That by the record aforesaid it appears that upon the trial of said cause in the United States circuit court for the district of Washing-

ton, western division, said circuit court sustained the objection of defendant in error to the admission in evidence of certain documents marked "Defendant's Identification No. 1" and "Defendant's Identification No. 2" and its judgment in sustaining said objection was affirmed by said circuit court of appeals whereas said circuit court should have overruled said objections and the said circuit court of appeals should have reversed the said judgment of said circuit court for error in sustaining said objection.

7.

That by the record aforesaid it appears that on the trial of said cause in the United States circuit court for the district of Washington, western division, that said circuit court denied the motion of plaintiff in error for judgment and directed judgment to be entered in favor of defendant in error and that the said circuit court of appeals affirmed the judgment of said circuit court in denying said motion and directing judgment to be entered in favor of defendant in error whereas the said circuit court should have granted
111 the motion of plaintiff in error, and said circuit court of appeals should have reversed said judgment of said court for error in denying said motion for judgment and in directing judgment to be entered in favor of defendant in error.

8.

That by the record aforesaid it appears that the United States circuit court for the district of Washington, western division, entered certain findings of fact and conclusions of law offered by the defendant in error, and refused to enter certain other findings of fact and conclusions of law offered by the plaintiff in error, and that said circuit court of appeals affirmed the judgment of said circuit court in entering said findings of fact and conclusions of law offered by the defendant in error, and in refusing to enter findings of fact and conclusions of law offered by plaintiff in error whereas the said circuit court should have refused the findings of fact and conclusions of law offered by defendant in error and should have entered the findings of fact and conclusions of law offered by plaintiff in error, and said circuit court of appeals should have reversed said judgment of said court for error in entering findings of fact and conclusions of law offered by the defendant in error and in refusing to enter the findings of fact and conclusions of law of plaintiff in error.

9.

That by the record aforesaid it appears that the United States circuit court for the district of Washington, western division, made and entered judgment in said cause in favor of defendant in error and against plaintiff in error in the sum of $3183.17, and that the said circuit court of appeals affirmed the said judgment of said

circuit court whereas the said circuit court should have made
112 and entered judgment in favor of plaintiff in error and against defendant in error dismissing said action and for costs, and said circuit court of appeals should have reversed said judgment of said circuit court.

Wherefore the said plaintiff in error prays that the judgment of the said United States circuit court for the district of Washington, western division, and the judgment of said circuit court of appeals affirming said judgment be reversed and that said cause be remanded to said circuit court for a new trial.

T. O. ABBOTT,
Attorney for Plaintiff in Error.

(Endorsed:) Assignment of errors. Filed April 15, 1903, F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

113 Know all men by these presents, that we, Adolphus F. McClaine, as principal and Alfred Coolidge and Emma Coolidge, his wife, as sureties, are held and firmly bound unto George C. Rankin as receiver of the First National Bank of South Bend, Washington, in the full and just sum of five thousand dollars ($5000.00) to be paid to the said George C. Rankin as receiver of the First National Bank of South Bend, Washington, his successors or assigns to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of April, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a United States circuit court of appeals for the ninth circuit, in a suit pending in said court, between said Adolphus F. McClaine as plaintiff in error, and said George C. Rankin as receiver of the First National Bank of South Bend, Washington, as defendant in error, a judgment was rendered against said Adolphus F. McClaine affirming a judgment of the United States circuit court for the district of Washington, western division, in favor of one J. Frank Aldrich the predecessor in office of said George C. Rankin as receiver of the First National Bank of South Bend, Washington, and against said Adolphus F. McClaine for the sum of thirty-one hundred and eighty-three and 47/100 dollars ($3183.47) and costs taxed at twenty-two and 40/100 dollars ($22.40), and the said Adolphus F. McClaine having obtained from the Supreme Court of the United States a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said George C. Rankin as receiver of the First National Bank of South Bend, Washington, to be and appear at a Supreme Court of the United States to be holden at Washington within sixty days from the date of said writ.

114 Now, the condition of the above obligation is such, that if the said Adolphus F. McClaine shall prosecute his said writ of error to effect, and answer all damages and costs if he fail to

make his plea good, then the above obligation to be void, else to remain in full force and virtue.

A. F. McCLAINE. [SEAL.]
ALFRED COOLIDGE. [SEAL.]
EMMA COOLIDGE. [SEAL.]

Acknowledged before me this 29th day of April, 1903.
W. L. CLIFFORD,
[SEAL.] *Commissioner U. S. Circuit Court, District of Washington.*

UNITED STATES OF AMERICA, } ss:
Ninth Circuit, District of Washington, }

Alfred Coolidge and Emma Coolidge, being duly sworn each for himself, deposes and says, that he is a householder in said district, and is worth the sum of five thousand dollars ($5000.00) exclusive of property exempt from execution, and over and above all debts and liabilities.

ALFRED COOLIDGE.
EMMA COOLIDGE.

Subscribed and sworn to before me this 30th day of April, A. D. 1903.
JAMES S. ADAMS,
[SEAL.] *Notary Public, Residing at Calfa, County of Whitman, State of Washington.*

(Endorsed:) Bond on writ of error. Form of bond and sufficiency of securities approved, Wm. B. Gilbert, judge. Filed May 5, 1903, F. D. Monckton, clerk.

115 United States Circuit Court of Appeals for the Ninth Circuit.

ADOLPHUS F. McCLAINE, Plaintiff in Error,
v.
GEORGE C. RANKIN, Successor to and Substituted for J. Frank Aldrich, as Receiver of the First National Bank of South Bend, Washington, Defendant in Error. } No. 793.

Certificate of Clerk United States Circuit Court of Appeals to Transcript of Record.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and fourteen (114) pages, numbered from one (1) to one hundred and fourteen (114), inclusive, to be a true copy of portions of the record, the opinion of the court, the assignment of errors, and of proceedings in the above-entitled case, as ordered by counsel for the plaintiff in error, and as the same appear of record in my office,

and that the same, together, constitute the transcript of record herein upon return to the annexed writ of error, as so ordered.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Attest my hand and the seal of the United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 19th day of May, A. D. 1903.

F. D. MONCKTON, *Clerk.*

116 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you, or some of you, between Adolphus F. McClaine, plaintiff in error, and George C. Rankin as receiver of the First National Bank of South Bend, Washington, defendant in error, a manifest error hath happened, to the great damage of the said Adolphus F. McClaine, plaintiff in error as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty days from the date hereof in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of April, in the year of our Lord one thousand nine hundred and three.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Allowed by—
WM. B. GILBERT,
U. S. Circuit Judge.

117 [Endorsed:] No. 793. Supreme Court of the United States. Adolphus F. McClaine, plaintiff in error, *vs.* George C. Rankin as receiver of the First National Bank of South Bend, Washington, defendant in error. Writ of error. Filed April 28, 1903. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

Return to Writ of Error.

The answer of the judges of the United States circuit court of appeals for the ninth circuit.

As within we are commanded, we certify under the seal of our said circuit court of appeals, in a certain schedule to this writ annexed the record and proceedings of the plaint whereof mention is within made, with certain things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within named defendant in error.

By the court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

118 UNITED STATES OF AMERICA, *ss:*

The President of the United States to George C. Rankin, as receiver of the First National Bank of South Bend, Washington, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, within sixty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein Adolphus F. McClaine is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Wm. B. Gilbert judge of the United States circuit court of appeals for the ninth circuit this 21st day of April A. D. 1903.

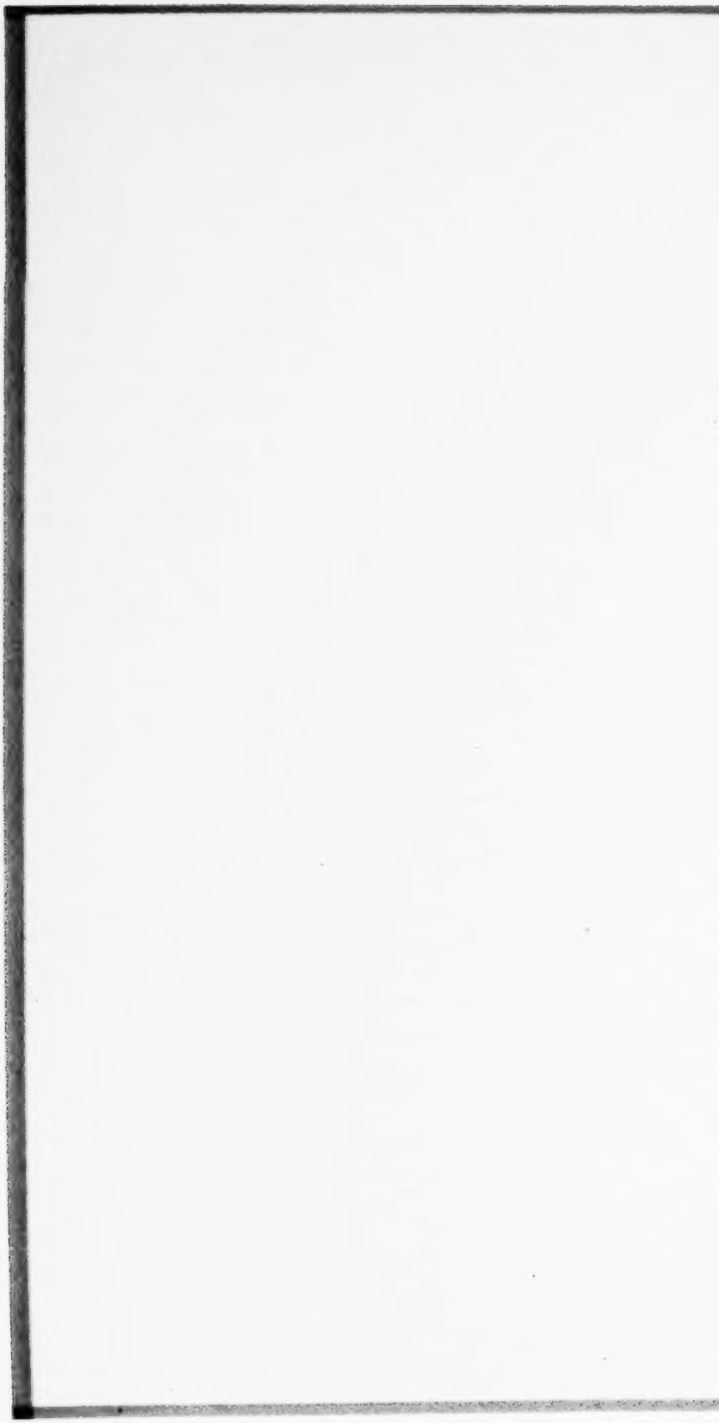
WM. B. GILBERT.

Service of above hereby accepted & formal service waived this the 22nd day of April 1903.

HUDSON & HOLT,
Att'ys for Def't in Error.

119 [Endorsed:] No. 793. Supreme Court of the United States. Adolphus F. McClaine, plaintiff in error, *vs.* George C. Rankin as receiver of the First National Bank of South Bend, Washington, defendant in error. Citation. Filed April 28, 1903. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

Endorsed on cover: File No. 18,972. U. S. C. C. of appeals, 9th circuit. Term No. 321. Adolphus F. McClaine, plaintiff in error, *vs.* George C. Rankin, as receiver of the 1st National Bank of South Bend, Washington. Filed June 16", 1903.



FILE COPY.

IN THE

Supreme Court of the United States of America.

ADOLPHUS F. McCLAINE,
Plaintiff in Error,

vs.

GEORGE C. RANKIN, as Receiver of the First National Bank of South Bend, Washington,
Defendant in Error.

58.

No. 58, October Term, 1904.

In Error to the United States Circuit Court of Appeals for the Ninth District.

Brief of Plaintiff in Error.

T. O. ABBOTT,
Attorney for Plaintiff in Error.

ALLEN & LANSDEN PRINTING CO., OVER POSTOFFICE.

IN THE

Supreme Court of the United States of America.

ADOLPHUS F. McCLAINE,
Plaintiff in Error,

vs.

GEORGE C. RANKIN, as Receiver of the First National Bank of South Bend, Washington,
Defendant in Error.

No. 321 October Term, 1903.
No. 58, October Term, 1904.

This an action by a receiver of an insolvent national banking institution for the purpose of recovering upon an alleged assessment against a stockholder.

The records will disclose the following facts:

STATEMENT OF FACTS.

The First National Bank of South Bend became insolvent and closed its doors on the 10th day of August, 1895, and on the 17th day of the same month one Joseph G. Heim was appointed its receiver. Subsequently, one J. Frank Aldrich, was appointed as Mr. Heim's successor, Heim having resigned; (see Transcript, p. 1-2, Par. II.) and later on, (during the progress of this proceeding) Mr. Aldrich resigned, and Mr. George C. Rankin, the defendant in error, was appointed in his stead.

On the 17th day of August, 1896, the *Depuly and Acting* Comptroller of the Currency levied an assessment against the shareholders of the insolvent bank on account of their statutory liability. (See Transcript, p. 2, Par. III.)

The defendant in error was a stockholder. Shortly afterwards, Mr. Heim (the then receiver) began actions against some of the stockholders who had not paid in their respective assessments, of which the plaintiff in error was one. A short time after the assessment fell due the defendant in error (by his predecessor, Mr. Heim) began an action against the plaintiff in error by *serving* the summons and complaint, but withholding the same from the record. This fact is important to bear in mind in connection with a counter-claim which appears in the record. By the provisions of the statutes of Washington an action is *commenced* when the defendant has been *served*, and it is the practice to withhold the papers from the public records until some question arises in the progress of the litigation which makes it necessary to obtain an order of the court, whereupon the papers are filed and the proceeding becomes public. It often happens that actions thus begun are settled entirely out of court and no public record of the matter is ever made. Shortly after the action was thus begun plaintiff in error made a proposition of settlement as follows:

"Regarding the assessment of 100 per cent upon the stock "held by me in the First National Bank of South Bend, I have "the following proposition to submit as to the payment of the "amount, $2,500, and the overdraft account of J. W. Morgan: "I will sell and deed to you lots Nos. 3 and 4, block 27, Cor- "rected Plat of South Bend, in payment of the amount of the "overdraft above mentioned, to-wit, $215.83, and $200 addi- "tional to be credited upon my stock assessment, you to *dismiss* "*the suit* brought against myself and wife. And I make the "*following* proposition as to the payment of the balance: I will "pay on May 1st, 1897, $425, on August 1st, 1897, $625, on "November 1st, 1897, $625, and on February 1st, 1898, $625."

See Transcript, p. 41.

It will be observed that this letter contained two distinct propositions, namely:

1. A proposition to give a deed to certain lots, in consideration of a credit of $415.83, and the dismissal of the action.

2. A proposition to pay the *balance* of the assessment at *stated times.*

This view of the letter is *res adjudicata* having been already determined in a former action, the record of which is in this action.

In answer to this letter the receiver wrote as follows:

"Yours of the 16th is at hand. Herewith I enclose you "deeds for lots 4 & 5, block 27, Corrected Plat of South Bend, "Wash., for you and your wife to sign. Upon the return to me "of the deed properly executed, and the receipt of $425 by May "1st next I will send you a receipt for the Morgan overdraft and "give you credit for $625 upon your assessment, and will make a "recommendation to the comptroller that your proposition of "4-8-97 be accepted, and will instruct my attorneys to hold in "abeyance, or dismiss the suit.

"If the proposition is not accepted by the comptroller, *I "will return you the deed unrecorded*, also, the money,—$425. "Your proposition having been made good by the first payment "will undoubtedly have great weight with the comptroller in de- "termining him to accept the proposition."

See Transcript, p. 41.

From this it will be seen that the receiver *accepted* the proposition *conditionally*, stating that he would make a *recommendation* to the comptroller that it be accepted; and agreed that if the comptroller did not authorize its acceptance, "I will return you the deed unrecorded."

The failure of the receiver to carry out his part of this arrangement, is the foundation of a long period of litigation which has finally found its way to this tribunal.

Plaintiff in error forwarded the deed in accordance with his proposition, and afterwards made a payment on account of the balance, as shown by the following letters:

"Herein deed to lots 4 & 5, bl'k 27, Corrected Plat of South "Bend as per our arrangement verbal and my proposition of "Apr. 8, 1897. * * "

"Herein my check No. 7 for $200, on acc't of payment due "May 10th. * * "

See letters Apr. 29 and May 2, 1897, Transcript, p. 42.

But Mr. Heim failed to *dismiss the action,* and failed to get the approval of the comptroller.

Other propositions and counter-propositions passed between the parties, but nothing ever came of them. (See letter of Nov. 2, 1897, to Heim; Transcript, p. 46). Finally, without notice to plaintiff in error, Mr. Heim proceeded to *file* the papers in the action, and *took a judgment by default* against him; but he did not then, and never has since, *returned the deed unrecorded, nor the money paid him as an evidence of good faith.*

When he learned that a judgment had been taken against him, plaintiff in error made application to have it vacated and set aside, upon the ground that it was taken contrary to the understanding between him and Mr. Rankin; and his application was granted by the court after a hearing upon the merits.

See Transcript, pp. 12, 13.

Subsequently Mr. Heim, without notice to plaintiff in error, secured an order of the court *dismissing* the action "without prejudice."

This order plaintiff in error caused to be modified by having the words "without prejudice" *stricken out,* for the sole purpose of having the order serve as a bar to another action on the assessment; and this modification was *consented* to by the attorney for Mr. Heim.

See Par. V, Transcript, p. 14.

As will appear below, the plaintiff in error contends that the order of dismissal, thus modified, created a bar against the maintainance of any further action upon the *assessment;* and that the defendant in error was thereupon relegated to his remedy, if he had any, upon the alleged *contract of compromise.*

THE SECOND ACTION BY THE RECEIVER AGAINST THE PLAINTIFF IN ERROR.

Such was undoubtedly the view of the receiver himself, for he thereupon immediately instituted an action against plaintiff

in error for this purpose. The record in this action is before this court.

See defendant's Exhibit "B," Transcript, pp. 31 to 40.

The important allegations of the complaint in that action appear on p. 33 of the Transcript, and read as follows:

"9.

"That plaintiff subsequently to the 17th day of September, "1896, begun an action against said defendants on the said "claim, in the Superior Court of the State of Washington, for "Pierce County, being case No. 16,663 in said court, and that "subsequently to the bringing of said action the said defendant "A. F. McClaine, made a written proposition to said plaintiff to "settle said claim, upon the following terms, to-wit:

"That the said defendant would pay $200 thereon, and that "said action *be dismissed*, and he would *then* pay the balance as "follows:

"$425 .....May 1st, 1897.
"$625 .....August 1st, 1897.
"$625 .....November 1st, 1897.
"$625 .....February 1st, 1898.

"And said proposition was *duly accepted* by plaintiff.

"10.

"That the said defendant made the first payment of $200 "thereon, on or about the 20th day of April, 1897, and also a "further payment of $200 on or about the 21st day of May, "1897; but has wholly failed to make any other or further pay-"ments on said settlement."

Mr. McClaine admitted the making of a written proposition to the receiver, but alleged that it was never carried out by the receiver; and he set up a counter-claim for damages resulting to him on account of the failure to dismiss the former action, as agreed.

See Answer, Transcript, pp. 34-37.

The counter-claim consisted of the loss of the fair and rea-

sonable value of the premises, amounting to $1200, and also the necessary expenditure for attorney's fees in securing the vacation of the judgment wrongfully taken against him, $100; making a total of $1300. The important allegations are as follows:

"V.

"That said default and judgment was taken without any "notice to this defendant; that immediately upon learning that "said judgment had been entered as foresaid, this defendant did "apply for the vacation thereof, and for leave to appear and "defend against said action; and that plaintiff was duly served "with a notice of said application, and did appear before said "court and did resist said application, *upon the merits thereof;* "and said court on the 21st day of February, 1898, after hear- "ing the evidence produced by both parties *upon the merits* of "said application and the argument of counsel thereon, and be- "ing fully advised, *did find* that the entering of said judgment "*was contrary to agreement and in violation thereof*, and did "order said judgment vacated and set aside and declared of no "effect and void.

"VI.

"That the full and fair value of the remises hereinbefore "described, at the time of the agreement hereinbefore referred "to was the sum of twelve hundred dollars.

"VII.

"That on account of said wrongful taking and entering of "said judgment, this defendant was compelled to expend in at- "torney's fees the sum of one hundred dollars."

Upon the issues as thus made up, the action went to trial. The evidence having been taken and submitted to the court, the receiver moved for a non-suit, which was granted.

See Transcript, p. 40.

THE THIRD ACTION BY THE RECEIVER AGAINST THE DEFENDANT IN ERROR.

This ended all attempts by the receiver to recover on account of the alleged *agreement of compromise*. But he thereupon re-

turned to the *assessment*, and notwithstanding the terms of the dismissal of the previous action on the assessment, (which shows conclusively the understanding of the parties that it was to serve as a *bar* to further proceedings on the assessment, else why the striking out *by consent* of the words "without prejudice"?) he instituted the action now at this bar,—being the third and last of the series.

The plaintiff in error first met the action by a plea that it was not brought within the time limited by law. His contention was sustained by the Circuit Court, (see Trans., p. 5) but upon appeal the order was reversed. Upon remand, the issue raised by the demurrer that the complaint did not state facts sufficient to constitute a cause of action was urged. This being overruled, (see Trans., p. 8) the plaintiff in error (see Trans., pp. 8-18). He set up two affirmative defenses, to-wit:

First: That the action was barred by the order of dismissal in the first action.

Second: He renewed the counter claim which he had interposed in the second action, adding to the items of damage, the failure of the receiver to return him the $200 in cash which he paid him as an evidence of good faith on the proposition to compromise.

A demurrer to the counter claim was interposed by the receiver and sustained by the court, except as to the $200 just referred to.

See Transcript, p. 19.

The issues were tried and determined by the court. For the purpose of showing that the receiver was not entitled to maintain the action "for want of the authority of the Comptroller of the Currency and of a court of competent jurisdiction," the defendant offered a certified copy of an order made by the Circuit Court, describing the claim against him, as a "bad and doubtful" asset, and directing the receiver "to *compromise and compound, or sell*" the same at private sale, and that he had not obtained any revocation of this direction, nor any authority to bring this action.

See Transcript, pp. 48-49.

The court overruled all the contentions of the defendant and rendered judgment against him for the sum of $3,183.47. It allowed the $200 counter claim for *cash* paid, as a credit upon the amount, and offered to allow the defendant,

—"a further credit of $200 of date April 29, 1897, on account "of the transfer of lots 3 & 4, block 27, Corrected Plat of South "Bend, *if he would accept the same*, but as he declines to say "whether he will accept the same or not, the court concludes that "it has no right to allow said credit of its own motion and with-"out the assent of the defendant."

See Conclusion of Law, Transcript, p. 21.

ASSIGNMENTS OF ERROR.

The errors upon which the plaintiff relies are as follows:

I.

That the judgment of the Circuit Court sustaining the demurrer to the complaint upon the ground that the action was not commenced within the time limited by law, should have been affirmed.

II.

That the demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action should have been sustained.

III.

That the motion of the defendant to strike the defense of the plaintiff, whereby he set up a counter claim against the receiver on account of the wrongful taking of the judgment in the first action, and on account of the loss of the true and fair value of the premises conveyed to the receiver in trust, and on account of the expenditures for attorney's services made necessary by the action of the receiver in taking the judgment, should have been denied.

IV.

That the Circuit Court should have rejected Exhibit "B," offered by defendant in error, whereby it was sought to prove the levying of the assessment, and the demand against the defendant to pay the same.

V.

That the Circuit Court should have sustained the motion of plaintiff in error for a non-suit, at the close of the trial.

VI.

That the Circuit Court should have admitted identifications Nos. 1 and 2, which were offered by plaintiff in error for the purpose of showing that the defendant in error was without authority to maintain this action.

VII.

That the court should not have entered the findings of fact and conclusions of law proposed by the defendant in error.

VIII.

That the court should have entered a judgment in favor of the plaintiff in error instead of for the defendant.

ARGUMENT AND AUTHORITIES.

THE FIRST ASSIGNMENT OF ERROR.

THE STATUTE OF LIMITATIONS.

If the contention of the plaintiff in error that this action is barred by the statute of limitations, is correct, it will be unnecessary to consider the other errors alleged.

That this action is barred by the statute of limitations we think can be shown by the decisions of this court and the statutes and decisions of the State of Washington.

The statutes of Washington in question here are as follows.

"Actions can only be commenced within the periods herein "prescribed after the cause of action shall have accrued."

See Ballinger's Code of Washington, Sec. 4796.

"Within three years: * * 3. An action upon a contract "or liability, express or implied, which is not in writing, and "does not arise out of any written instrument." * *

See Ballinger's Code of Washington, Sec. 4800.

"An action for relief *not hereinbefore provided for* shall be "commenced within two years after the cause of action shall have "accrued."

See Ballinger's Code of Washington, Sec. 4805.

This action was begun within *three* years, but not within *two* years. Hence these statutes present only one question for the consideration of this court, which is, is the additional liability of a stockholder in a national banking association a *contractual* or *statutory* liability *within the meaning of the statute of limitations?*

It will not be contended here that, *for some purposes*, this liability is contractual. This view has been so often taken by the courts of this country, and by this court particularly, that it would be a waste of time to contend here to the contrary. It will be found, however, upon an examination of these authorities that it has never been held, where the question has been directly presented, that the liability was in the nature of a contract *when considered with reference to the statute of limitations.* On the contrary it has been held, in many courts, that for the purpose of the statute of limitations, the liability must be considered as *statutory;* that is to say, it being a liability "created by statute," actions to enforce it must be brought within the period specified for the bringing of actions to enforce statutory liabilities.

In Washington there is no statute relating in express language to a liability created by statute, "except for a forfeiture or penalty."

An action to enforce such a liability therefore comes within the provision of section 4805, above quoted, because it is an action upon a liability for which no relief is "hereinbefore provided for." That this view of the statute is well founded has been held by the Supreme Court of the State of Washington in the following cases:

Spokane vs. Stevens, 12 Wash., 667.
Ballard vs. West Coast Co., 15 Wash., 572.
State vs. Ballard, 16 Wash., 418.
Seattle vs. De Wolfe, 17 Wash., 349.

These cases relate to the enforcement of liens, against real property, *created by statute* for public improvements made by municipalities. It is squarely decided, and constantly affirmed, that actions of this character are to be classed with actions "not specifically provided for" in any of the provisions of the statute of limitations, and must therefore be commenced within two years after the cause of action has accrued.

The learned court below failed to distinguish the rule. (See Aldrich vs. McClaine, 106 Fed., 791). Having ascertained that the obligation was contractual for *some* purposes it concluded that it was contractual for *all* purposes. It relied largely upon the decision of this court in Bank vs. Hawkins, 174 U. S., 364. But the statute of limitations was not involved in that case. That action was upon an *original* subscription and the sole question was whether one banking association possessed the right to subscribe for and hold the stock of another banking association. The obligation was declared to be contractual for that purpose.

But since Bank vs. Hawkins and the case at bar were decided, this court has had occasion to consider the direct question in issue here, and has adopted the rule contended for by plaintiff in error.

See *McDonald vs. Thompson*, 184 U. S., 71.

This case plainly distinguishes the nature of this contract. First: It holds that it is not a contract *in writing*. Second: That *if* it is a contract at all it is (to use the language of the court) "a contract *created by statute* and obligatory upon the "stockholders *by reason of the statute* existing at the time of their "subscription;" and it is stated further that: "In none of the "numerous cases upon the subject in this court is this obligation "treated as an *express contract*, but as one *created by the statute* "and implied from the express contract of the stockholders to "take and pay for shares in the association,"—citing many authorities, among them being Bank vs. Hawkins, *supra*, so strongly relied upon by the court below. Third: That the action was barred because the liability was "*a liability created by statute*," regardless of the fact that it might be *contractual* for some purposes.

Howarth vs. Angle, 56 N. E., 489, and Howarth vs. Lombard, 56 N. E., 888, were also cited with approval by the learned court below to support its views against the contention of the plaintiff in error, but the issues presented in those cases related entirely to the right of a receiver of a banking association in one state to maintain an action against a subscriber to stock, residing in another state;—in other words, the only question was whether the action was a transitory one. The statute of limitations as applied to the secondary liability was not involved. This remark applies to nearly all the cases cited and relied upon by the court below.

In the case of Chapman vs. Morrell, 20 Cal., 137, the late Justice Field, then judge of the California court, in discussing the application of the statute to a contract *in writing*, used the following very pertinent language: "The statute provides that 'an " 'action founded upon any contract, obligation, or liability " 'founded upon an instrument of writing,' except in certain des- "ignated cases, shall be commenced within four years, and an "action upon a contract, obligation, or liability not thus founded, "with certain exceptions, shall be commenced within two years. "The statute by the language in question refers to contracts, ob- "ligations, or liabilities resting in, or growing out of, written "instruments, *not remotely or ultimately*, but *immediately;* that "is, to such contracts, obligations, or liabilities as arise from "instruments of writing *executed* by the parties who are sought "to be charged in favor of those who seek to enforce the con- "tracts, obligations, or liabilities. The construction would be "the same if the word 'founded' were omitted, and the statute "read 'upon any contract, obligation, or liability upon an in- " 'strument of writing.' "

The force of this reasoning applies equally to *unwritten* contracts. If the learned judge had had such a contract before him, he would doubtless have said that the three-year statute, when it speaks of contracts *not* in writing, refers to "obligations or lia- "bilities pertaining to, or growing out of *unwritten* contracts, "*not remotely or ultimately*, but *immediately.*"

Furthermore and following directly in line with the principles enunciated by Justice Field, the Supreme Court of the

State of California has, in several cases, directly distinguished the nature of the secondary liability of the stockholder in its relation to the statute of limitations. These cases are reviewed in Bliss vs. Sneath, 119 Cal., on page 530, as follows:

"A liability may be *at the same time* a statutory and a con-"tract liability—and so it has been held by this court with re-"spect to the liability of stockholders. It is a *statutory liability* "as to the *statute of limitations* (Moore vs. Boyd, 74 Cal., 167), "and a contract liability as to the right of attachment (Kennedy "vs. California Sav. Bank, 97 Cal., 93;) and as to the law defin-"ing the jurisdiction of justices of the peace. (Dennis vs. Su-"perior Court, 91 Cal., 548.)"

The Supreme Court of the State of Washington has itself passed upon statutes of a similar nature and has distinguished the nature of this liability. In the case of Wilson vs. Brook, 13 Wash., 676, it is stated that "the liability is not *on*, but *for*, the contract, debt, or agreement." In other words it is a liability against the stockholder *created by statute* for the protection of the creditors and which he voluntarily *assumes* as a *liability* and not merely as a contract obligation.

In Thompson on Corporations, Sec. 1991, the nature of this liability is thus distinguished by the learned author: "There is "some confusion among the authorities on the question whether "an action by creditors of the corporation against stockholders "is governed by the statute of limitations relating to actions upon "contracts, or by the statute relating to actions upon statutory "liabilities. The true solution of this question will, it is believed, "be found in recurring to the consideration that, at common law, "a creditor has no such right of action; since his debtor is the "corporation, which is a different legal person from that of one "of its stockholders; since the stockholder is not a partner and "since there is no privity of contract between him and the stock-"holder. * * *Without the aid of a statute*, therefore, the "creditor has no remedy directly against the stockholder. It is, "therefore, a *statutory remedy*, and is governed by the statute of "limitations applicable to such remedies, and not by the statute "applicable to actions upon contracts."

See also
Wood Stat. Lims. (3rd Ed.) Sec. 36, 39.
Robertson v. Bowline Co. 66 Fed. Rep. 63.

Mr. Justice Story, in the well considered case of Bullard vs. Bell, 1 Mason, (U. S.) 243, (see also Fed. Cases No. 2121), says that an action to enforce this liability "is certainly not a case of "express contract; and the most that can, by the utmost strain- "ing, be asserted, is, that it is a case arising *quasi ex contractu.* "It is in truth, however, a mere *legal liability, created by statute,* "which *may* furnish the *foundation* or *consideration* of a contract "express or implied; *but it is not of itself a contract.*"

Statutes of limitations affect the *remedy* only and do not enter into the *contractual* rights or obligations of the parties. They are statutes of repose and courts will look to their express *letter* to ascertain the intent of the legislature. If the legislature had intended to include "statutory liabilities" in the provision relating to contracts, it is imperative that it should have specifically so stated. Statutes of limitations are not extended by construction. Such statutes are in derogation of the common law and are to be strictly construed. Statutes in derogation of the common law are not presumed to make any alteration in the common law further than the *clear import of the language necessarily requires.*

Shaw vs. N. P. R. R. Co., 101 U. S., 557.

Johnson vs. Southern Pacific, 117 Fed., 462.

In concluding our argument upon this error we have to say that in no case which we have been able to discover has it been held that this liability is contractual for the purposes *of the statute of limitations.* All those cases, where a subscription to stock has been considered as a contractual liability, have arisen upon an effort to enforce an *original* subscription, or with reference to whether the action was of a *transitory* nature, or concerning the right of one banking corporation to hold and become liable for the stock of another banking corporation, etc.

SECOND ASSIGNMENT OF ERROR.

DOES THE COMPLAINT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION?

The contentions of the plaintiff in error upon this head are two-fold.

1. He contends that it was beyond the power of the *deputy* and *acting comptroller* to levy an assessment.

2. That the complaint does not state what the total capital stock of the association was at the time when the assessment was levied.

POWERS OF DEPUTY COMPTROLLER.

The first contention will embrace a consideration of assignment of error No. IV, namely, that the Circuit Court should have rejected exhibit "B," offered by defendant in error, whereby it was sought to prove that the assessment had been levied as required by law. (See Transcript, pp. 28-30.) It is necessary only to state that by statute the *comptroller* of the currency is the only authority having the power to determine the fact of insolvency of a national banking institution for any purpose whatever, and to decide when a resort must be had against the liability of the stockholders.

See U. S. R. S., 5234.

The *deputy* comptroller of the currency is an officer provided for by law, but we do not find that his duties are specially prescribed elsewhere than in the appropriation act of March 3, 1875. By that act the office of chief clerk of the various bureaus in the Treasury Department was abolished and it was also provided "that the duties *heretofore prescribed* by law and performed by the *chief clerks* in the several bureaus named, shall hereafter devolve upon and be performed by the several *deputy comptrollers*," etc.

See Supp. U. S. R. S. Vol. 1, p. 76.

The duties of the deputy comptroller do not seem to have been previously prescribed; but whatever they may have been it must be held that his duties were thereafter limited to those formerly belonging to the chief clerks. There is no saving clause in the statute, namely, that "such duties shall be *in addition* to those now required of him by law."

Since, therefore, it was never any part of the duties or powers of the chief clerk to determine the insolvency of a national

bank, nor to levy an assessment against its stockholders, the deputy comptroller was not authorized to act in the manner in which the complaint states and the proof shows that he did act.

See exhibit "B," Transcript, pp. 28-29.

The exhibit shows (and the deputy and acting comptroller certifies), "that whereas it appears to *my* satisfaction that in "order to pay the debts of such association it is necessary to en- "force the individual liability of the stockholders * * there- "fore by virtue of the authority vested in *me* by law *I* do hereby "make an assessment," etc.

It was incompetent for the deputy and acting comptroller to announce that by virtue of any authority vested in him by law, an assessment could be levied.

Since all of the subsequent proceedings were based upon this act, they must fall.

THE TOTAL CAPITAL STOCK OF THE INSOLVENT BANK DOES NOT APPEAR.

The second contention under this head, that it does not appear in the complaint what the total capital stock of the association was at the time of the alleged assessment must also, if correct, be determinative of this action. All of the allegations of this complaint concerning this point are found in paragraph III on page 2 of the Transcript. It is there stated that an assessment and requisition has been made upon the shareholders "for fifty "thousand ($50,000) dollars, the said sum to be paid by them "ratably on or before the 17th day of September, 1896, and the "said deputy and acting comptroller of the currency of the Unit- "ed States made a demand on each and every one of the said "shareholders for one hundred ($100) dollars upon each and "every share of the capital stock of said association held and "owned by them respectively at the time of the failure and sus- "pension of the said bank as aforesaid."

It will be seen that it is nowhere stated nor could it be reasonably inferred from any of the language used, what the total amount of the capital stock may have been. The total assessment could have been $50,000 to be paid ratably and the total

capital stock might have been $1,000,000, for aught that appears to the contrary; nor is the allegation made clearer by the subsequent statement that one hundred ($100) dollars has been demanded from each and every share held by each shareholder.

And here we must advert to what appears to have been a very glaring oversight by the learned court below. It is stated in the opinion that—"while it does not in direct terms state the "total amount of the capital stock, it sets forth facts from which "it may be inferred. It alleges that the total assessment upon the "shareholders was $50,000; that it was made ratably; that the "assessment *was* $100 *upon each share;* that *there were* 500 "*shares* and that their par value was $100 each. From these "averments it is plain that the capital stock was $50,000." Were all the averments stated by the learned court below to be found in the complaint we should certainly concede that our objection was not well taken—indeed we should say that it was frivolous. But we are totally unable to ascertain where the allegation appears in the complaint "that the assessment *was* $100 *upon each share;* "that there were *five hundred shares*, and that the par value "was $100 each." Certainly no such allegations can be found in the complaint. It is not enough to *allege* that an assessment is made "ratably"—that is a mere conclusion of law. The facts should be stated in full from which it will conclusively appear that it *is* a ratable assessment. This fact can only be determined by first ascertaining what is the total amount of the capital stock, then determining what is the total amount of the deficit, and then considering the proportion which the stockholder is liable for. Fortunately, this contention has been well sustained by this court in United States vs. Knox, 102 U. S., 422, from which we quote as follows:

"In the process to be pursued to fix the amount of the sepa- "rate liability of each of the shareholders, it is necessary to as- "certain, (1) the *whole amount* of the par value of *all* the stock "held by *all* the shareholders; (2) the amount of the deficit to "be paid after exhausting all the assets of the bank; (3) then "to apply the rule that each shareholder shall contribute such "sum as will bear the same proportion to the whole amount of the "deficit as his stock bears to the whole amount of the capital

"stock of the bank at its par value. There is a limitation of this "liability. It cannot in the aggregate exceed the entire amount "of the par value of all the stock."

This authority shows conclusively that the averments of the complaint are not sufficient upon which to found the action. The whole amount of the par value of the capital stock held by *all* the stockholders is not ascertained from the complaint; and therefore it follows that it is not possible to ascertain what is the *ratable* proportion of each shareholder. The statute itself fixes the liability as a *ratable* one only, and it is of the first consideration to ascertain the *facts*, for the purpose of determining the share of plaintiff's liability, if he has any.

THE THIRD ASSIGNMENT OF ERRORS.

THE RIGHT OF THE DEFENDANT TO RECOVER DAMAGES AGAINST THE RECEIVER, AS A COUNTERCLAIM.

If the view of this court should be adverse to the contention of the plaintiff concerning the previous assignments of error, he then urges as error that the counterclaim whereby he sought to recover damages against the receiver, was stricken out on motion of the defendant. It is difficult to conceive upon what ground such a rule can be upheld unless it is that whatever wrongful acts were committed by the receiver were of a personal nature and not such as the receivership could be made responsible for. If this be the proper conclusion, (and we are not now contending that it is not) then it must follow that the property, which was conveyed to the receiver and by him turned into the trust, must be returned to the defendant. It is beyond question (the correspondence conclusively shows this) that the conveyance was made to the *receiver in trust* until he could secure the ratification of the proposed contract of compromise between the parties. It is also beyond question that the proposition was never carried out by the receiver and that he violated the terms thereof in the taking of the judgment. This question, as we have already said, is *res adjudicata*, having been decided *on the merits* in favor of the contention of the plaintiff in error, as shown by the record in the first action.

Certainly one of two conclusions must necessarily follow from the admitted facts: Either the receiver was bound to return the property upon his failure to carry out the terms of the agreement or he is now bound to allow to the defendant the true and fair value of the premises which have been absorbed by the trust, as an offset or counterclaim to any judgment which he may be entitled to recover.

And here we must advert to the opinion of the learned court below wherein this question was argued. It is there stated that because the lots were turned over at an *agreed* price, the plaintiff in error cannot complain that he has not received credit for the full value thereof; and it is further stated that he failed to carry out the agreement relative to the payments and therefore cannot complain of the subsequent conduct of the receiver. If this contention of the learned court below were sustained by the record undoubtedly it would be unanswerable. But the learned judge who wrote the opinion evidently overlooked the fact that the negotiations between the parties never passed beyond the stage of *proposals* and counter-proposals; that in fact there was no *agreement* between them. The plaintiff performed his part of the proposal by executing the conveyance of the property and placing it in the hands of the receiver as trustee for the purposes of having the proposal confirmed and concluded as an *agreement.*

It must not be forgotten in considering this question (and the plaintiff is bound to have had knowledge of that rule of law) that a receiver of a national banking association has no power whatsoever to enter into a binding *agreement* concerning matters affecting his trust *without the authority of the comptroller.* It is, however, necessary to deal with him in the first instance. He is the only intermediary. Hence a certain amount of trust and confidence must necessarily be reposed in him. In the case at bar he expressly stated that he would hold the deed until the proposal had become final and conclusive and that if there should be any failure in this respect he would return the same unrecorded.

How then can it be said that the plaintiff in error has failed to comply with the terms of his agreement?

Undoubtedly it was because of the fact that no agreement

had been entered into between the parties in this case that the second action resulted adversely to the defendant in error and that he asked for and was given a voluntarily non-suit at the close of the trial.

While it is true that the lots were turned over at an *agreed price*, it is also true, that they were turned over upon an *agreed condition*, which was never carried out by the receiver. The receiver in several of his letters urges the plaintiff to *make good* the *proposition* by a cash payment and states that it will "undoubtedly have great weight with the comptroller in determining whether to accept the proposition." (See letter of April 22, Transcript, p. 41). In another letter he says that if plaintiff in error will make him a cash payment the money will "not be applied on the settlement until it is sanctioned by the comptroller" and if not sanctioned "to be subject to the order" of the plaintiff in error. (See letter of October 4, 1897, Transcript, p. 44).

Such representations certainly make the defendant in error a *trustee* for the plaintiff. He had no right to receive the money upon a representation that he would return it if the proposal was not ratified by the comptroller, and, at his convenience, long afterwards, apply it upon the assessment.

When offsets have been denied to a stockholder it has been where he was claiming an allowance on account of a *deposit* or of some *indebtedness* owing him by the bank *previous to its insolvency*. This is upon the theory that the *additional* liability is for the benefit of the depositors. In the case at bar the depositors have received the benefit of the full value of the lots conveyed; the lots should be construed *as so much cash*, at their fair value paid by the plaintiff in error and *applied* by the receiver for the benefit of the depositors. To hold otherwise would be to say that the plaintiff in error should pay more than a *ratable share* of the debts and liabilities of the trust.

That error was committed by the court in striking out this defense is apparent from the subsequent proceedings in the case. It attempted, upon the entering of the findings of fact and conclusions of law, to make a correction of the original error upon the demurrer to the complaint, by the offer to make a credit to

plaintiff in error of $200 "on account of the transfer of lots 3 "and 4, block 27, Corrected Plat of South Bend, *if he would* "*accept the same*, but as he declines to say whether he will accept "the same or not the court concludes that it has no right to allow "said credit of its own motion and without the assent of the "defendant." Upon what theory was the court powerless to make this credit without the assent of the defendant? Undoubtedly, because of the fact that, to do so was outside the issues of the case as they then stood, the court having stricken out, on motion of the defendant in error, that portion of the answer which would have made this a proper issue in the case.

For the defendant to have *consented* to a credit of an amount which he had neither asked nor desired, and which was not within the issues before the court, and was entirely inadequate, would have constituted an undoubted waiver of his rights to prosecute this cause further with any hope of success.

FIFTH ASSIGNMENT OF ERROR.

THE COURT SHOULD HAVE SUSTAINED THE MOTION FOR NON-SUIT AT THE CLOSE OF THE TRIAL.

The fifth assignment, really includes all the other questions in the case.

The first question is, whether the dismissal of the first action created a bar to the maintainance of another action upon the *assessment?*

The second question is, whether the receiver had obtained the requisite authority of the comptroller of the currency and a court of competent jurisdiction, to maintain this action?

THE BAR OF THE FIRST ACTION.

First, it seems to us from the admitted facts of this case that the order of the court in the first action dismissing the same and striking out the words "without prejudice" (which were inserted without the knowledge of the plaintiff in error and afterwards stricken out at his instigation, and by *the consent* of the

defendant in error), constitute an *agreed dismissal* and present a conclusive bar to the maintainance of another action by the same parties for the same cause. No contention is made that an ordinary dismissal, without a trial upon the merits, and without any agreement between the parties, can create a bar. The Washington statute regulates this question by providing that *in such cases*, the dismissal will not work a bar. But such is not the case here. What better evidence could there be of a dismissal *by agreement* than that presented in this case? The receiver accepted the deed upon the very condition that he would dismiss the action. That he failed to do so *voluntarily* does not militate against our contention that he was *bound* to do so; and that the dismissal was *enforced* by order of the court after a trial upon the merits, (in which the very question of his duty to do so was the question at issue) is all the more conclusive of a final adjudication of the controversy concerning the *assessment*.

As before stated, such was undoubtedly the view of the receiver at the time, else why was an action immediately begun upon the alleged *contract?* And when we remember that the order itself was changed, at the request of the plaintiff in error and by the consent of the defendant, and the very words which are recognized everywhere as being inserted for the purpose of avoiding a bar to another action, were stricken out, can it be contended for a moment that it was not the intention and understanding of all the parties, including the court, that the dismissal was an *agreed* one and was to constitute a final settlement of the controversy concerning the *assessment?* That the receiver failed to dismiss voluntarily, can only affect the right of the defendant to recover damages.

It is competent for parties in a pending action to compromise and settle the same and cause it to be dismissed for the purpose of creating a bar to further proceedings. To hold otherwise would be to say that it is not competent for the parties to contract with reference to litigation. In Merritt vs. Campbell, 47 Cal., 542, it was said that "a judgment of dismissal, when "passed upon and entered in pursuance of an *agreement of the "parties*, must be understood, in the absence of anything to the "contrary expressed in the agreement and contained in the

"judgment itself, to amount to such an adjustment of the merits "of the controversy, by the parties concerned, as will constitute "a defense to another action afterwards brought upon the same "cause of action."

Upon no theory, except an agreed dismissal, is it possible to comprehend the position taken by the receiver,—and which he continues to take,—that he is entitled to withhold the *consideration* given by the plaintiff in order to obtain the dismissal, namely, the title to the lots.

Herman on Estoppel says: "A judgment of dismissal ren- "dered on the application of either party, with the consent of "the other, amounts to an open and voluntary renunciation of "the plaintiff's suit which is a bar to another suit subsequently "brought upon the same cause of action." And again he says: "If the complainant desires to reserve the right of a future "action, the dismissal must be 'without prejudice,' or the pre- "sumption should be that it is on the merits. It is trifling with "justice to allow a party to bring as many actions as he may "see fit to, simply because he pays the costs." See

Herman Estoppel, p. 297.
Nashville, etc., vs. United States, 113 U. S., 261.
Lyon vs. Perrin, etc., 125 U. S., 698.
Bartlett vs. Sheehorn, 25 Wash., 261.
Crossman vs. Davis, 79 Cal., 603.
Newark vs. Newark, 22 Mich., 292.
Durant vs. Essex, 7 Wall., 107.
Gove vs. Lyford, 44 N. H., 525.
Kelsey vs. Murphy, 25 Pa. St., 78.
Thurston vs. Thurston, 99 Mass., 39.
Garner vs. Second National Bank, 89 Fed., 636.
Jarboe vs. Smith, 52 Am. Dec., 541.
Bigelow vs. Winsor, 1 Gray (Mass.), 299.
2 *Black Judgments*, Sec. 706.

In Jarboe vs. Smith, supra, it was said: "A new cause of "action may arise upon the agreement of the parties, that pro- "duced the order dismissing the suit; and there might possibly "be cases where, by the terms of the agreement, a suit could be

"maintained upon the original cause of action, but it would be "alone by virtue of the stipulations contained in the agreement "of the parties."

In the case at bar, however, the agreement was for an absolute dismissal, the consideration thereof (to-wit, the lots), was paid for by the plaintiff in error and received by the defendant in error. It seems to us that it is impossible to make a plainer case of a bar than this one.

It may be argued, in order to avoid the effect of the former dismissal, that it was not a trial upon the merits. The record, however, will conclusively settle this question in favor of the contention of plaintiff in error.

By reference to p. 36 of the transcript (Par. V.) ,it will be seen that plaintiff in error set up in his answer in the second cause of action that the dismissal was upon the merits, and the defendant in error in his reply *admitted* this allegation to be true.

"That said default and judgment was taken without any "notice to this defendant; * * * and said court on the 21st "day of February, 1898, after hearing the evidence produced "by both parties *upon the merits* of said application and the "argument of counsel thereon, and being fully advised, did find "that the entering of said judgment was *contrary to agreement* "and in *violation thereof*, and did order said judgment vacated "and set aside and declared of no effect and void."

On p. 39, (Par. V.), of the reply the defendant in error states:

"He *admits* the allegations contained in paragraph five, ex-"cept the allegation that said default and judgment were taken "without any notice to the said defendant."

Thus the receiver admits that his acts were contrary to and in *violation* of the agreement.

It will doubtless be argued that under the laws of the State of Washington it is prescribed that a judgment of dismissal or non-suit does not serve as a bar. Such was the view of the learned court below, and we concede such to be the law, upon an

ordinary dismissal. But it has been held by the Supreme Court of Washington that this statute does not apply to an action which is dismissed after a trial *upon the merits.*

See *Bartlett vs. Sechorn*, 25 Wash., 261.

WANT OF AUTHORITY, ON THE PART OF THE RECEIVER, TO SUE.

One of the reasons why the non-suit asked for by the plaintiff in error should have been granted, is the fact that the receiver never obtained the previous authority of the comptroller of the currency to institute this action. In addition to the grounds stated in the argument of the Second Assignment of Error, concerning the want of authority on the part of the Deputy Comptroller to levy the assessment, we desire now to urge, that the receiver was acting contrary to the *direct and positive orders of the Comptroller and the Court*, and was wholly without authority to sue.

It is plainly settled by the authorities that a receiver of a national banking association has no power to bring an action, to enforce the personal liability of a stockholder without the direct, positive, and *previously* obtained authority of the Comptroller; and that this authority must be specifically averred in the complaint and proved when put in issue. The statute upon this subject is so plain that it would seem not to require any adjudication, but fortunately for the plaintiff in error, it has received ample consideration at the hands of this court. That portion of section 5234, U. S. R. S., which is applicable to this question reads as follows: "Such receiver, *under the direction of the* "*Comptroller*, shall take possession of the books, records, and "assets of every description of such association, collect all debts, "dues and claims belonging to it, and upon the *order of a court* "*of record* of competent jurisdiction may sell or compound all "bad or doubtful debts and on *a like order*, may sell all the real "and personal property of such association, on such terms as the "court shall direct, and may, if necessary to pay the debts of "such association, enforce the individual liability of the stock-"holders."

That the receiver is without power to "enforce the indi-"vidual liability of the stockholders," without the *previous* authority of the Comptroller, has been settled by this court in the case of Kennedy vs. Gibson, 8 Wall., 506. The language of the court is forceable and unambiguous. It is there stated:

"The receiver is the instrument of the Comptroller. * * "* * It is for the Comptroller to decide when it is necessary "to institute proceedings against the stockholders to enforce "their personal liability, and whether the whole or a part, and "if only a part, how much, shall be collected. These questions "are referred to his judgment and discretion. * * * The "stockholders cannot controvert it. He may make it at such "time as he may deem proper, and upon such data as shall be "satisfactory to him. *This action on his part is indispensable* "whenever the personal liability of the stockholders is sought "to be enforced, and must *precede* the institution of suit by the "receiver. The fact must be *distinctly averred* in all such cases, "and if put in issue *must be proved.*"

Mr. High, in his work on Receivers, takes the same view and distinguishes between the *general* power of a receiver of a National Bank to institute actions, without the specific authority of the Comptroller, to enforce demands due the bank. In such case, he says, it is not necessary that he should first obtain the consent of the Comptroller, "the case being clearly distinguish-"able from that of an action against shareholders, to enforce "their personal liability."

High Receivers, Sec. 360 (1st Ed.)

By reference to the documents offered by the plaintiff in error and rejected by the court (Trans., pp. 47-50), it will appear that the receiver on the 30th day of September, 1897, (which was long previous to the institution of this action), petitioned the judge of the Circuit Court of the United States for the District of Washington, for authority to close up the affairs of his trust, and to dispose of the remaining assets in his hands. The petition recites that the assets remaining in his hands consist of various properties, including "claims due upon the *assessment of* "*the capital stock* of said bank;" and that the petitioner has,

"after exhausting all means of collection, been unable to realize "upon said assets, which your petitioner is informed and be- "lieves are bad and doubtful assets." He then states that he can realize a considerable sum by compromising and compounding the same, or selling them at public or private sale. Among the properties listed by him are "lots three (3) and four (4), block "twenty-seven (27), Corrected Plat of South Bend," the property received by him from the plaintiff in error on account of the first proposal of compromise. Perhaps the most important recital of said petition is the following, which shows conclusively that this receiver, instead of acting under the direction of the comptroller, when he instituted this proceeding, acted directly in opposition thereto. He says:

"Your petitioner further represents that an examination of "the condition of the affairs of said receivership has been made "by a special national bank examiner, *under the authority and "direction of Hon. James H. Eckels, Comptroller of the Cur- "rency*, and that *all the remaining* assets of said trust are bad "and doubtful, and it is *the desire of the said Comptroller of the "Currency* that said receivership be closed at an early date, and "that *said Comptroller has directed and authorized* your peti- "tioner to apply to this Honorable Court for an order author- "izing and empowering your petitioner, as such receiver, to "*compromise and compound*, or SELL at private sale, all of the "assets of said trust, and to SELL at public sale all of the re- "maining assets thereof (except such as may be compounded or "sold at private sale), for cash, after duly advertising the sale "at public auction pursuant to law."

See Transcript, p. 48.

The prayer of the petitioner is that the court issue an order directing him to compound, or SELL, all of said assets.

The order of the court, based on this petition, recites that, "being fully advised in the premises, the court doth hereby or- "der, adjudge, and decree that said Joseph G. Heim as receiver "aforesaid, be and he is hereby authorized to *compromise* and "*compound*, or SELL, at private sale all of the assets of said "bank, consisting of bills receivable, judgments, overdrafts, stock

"and securities, *claims due upon assessment of the capital stock* "of said bank," etc. (See Trans., p. 49). He is also authorized to sell the lots three (3) and four(4), block twenty-seven (27), Corrected Plat of South Bend.

Here was a specific direction made by both the comptroller and the court TO SELL (in case he could not compound) "all claims due upon assessment to the capital stock." That this order was a wise one is shown by the expense and delay which has followed its disobedience. Nearly seven years have elapsed and the trust is not yet closed; three actions have been brought which have involved the trust in heavy expense for costs and attorney's fees, a large part of which it will never be reimbursed, even if it should succeed in the present action.

Subsequently, on the 6th day of October, 1897, the receiver reported to the court that he had held a sale of the assets, under the former order of the court, setting out in detail the various properties disposed of and the amounts received therefor, and upon said report an order was entered confirming the sale.

This order was entered on the 6th day of October, 1897,—nearly two years before the beginning of this action. It was never modified in any manner; and the receiver was never afterwards in any manner authorized by the comptroller of the currency, or by any court of competent jurisdiction, to institute this action. It is not even alleged in the complaint that he was so authorized. This being so, there is but one conclusion to draw, and that is, that the receiver, in instituting this action, not only acted without the authority of the comptroller, or of a court of competent jurisdiction, but acted in direct defiance of said order. His petition to sell the remaining assets shows that the comptroller had investigated the whole matter and had found it desirable to close up the trust, and as a result of those investigations, had directed him to sell the assets, including this claim.

Suppose the receiver had, acting upon the recommendation of the comptroller, obtained a *special* order directing him to compound, or sell, the particular assessment against plaintiff in error, and in entire disregard of the instructions of the court, had afterwards instituted this action. Would it be contended, in that event, that he could maintain this action? Certainly not. And

yet there is no difference in principle between such an order and the one entered by the court directing him to compound or sell all the "claims due upon assessment of the capital stock," of which this assessment is one.

It may be urged that the want of authority on the part of the receiver to institute this proceeding, has been supplied by the comptroller, since the action was begun, by reason of the fact that he has not ordered it discontinued. It is a sufficient answer to this to say, that even if this were true, it does not come within the rule laid down by this court in Kennedy vs. Gibson, *supra*, where it stated that the authority of the comptroller must *precede* the institution of the action; and must be distinctly averred and proved.

Furthermore, it must not be forgotten that this action was instituted within three years lacking but two days, and if the comptroller has since conferred the authority it is important to know just when it was conferred—whether before or after the right of action was concededly barred.

ELECTION OF REMEDIES.

As an additional ground why the court should have granted the motion of plaintiff in error for a non-suit, we urge that the receiver made an election of remedies and that it is not competent for him after having instituted a proceeding to recover upon the alleged *contract of compromise*, to bring another action against the plaintiff in error upon the *assessment*. In other words the receiver, having elected to consider the assessment as merged in a contract of compromise, and having failed in his effort to enforce the alleged contract, can he now be heard to say that the assessment still exists?

It is a well settled rule of law that when a person elects to proceed according to one theory of fact for the protection and enforcement of his rights, as he deems them to be, he cannot afterwards abandon his position and proceed according to another theory which is inconsistent with the former theory. He cannot thus blow hot and cold.

To state the rule in the language of these authorities as summed up in 7 Ency. Pl. and Pr., p. 364: "It is certainly the "established law in every state that has spoken on this subject, "that the definite adoption of one of two or more inconsistent "remedies by a party cognizant of the material facts, is a con- "clusive and irrevocable bar to his resorting to the alternative "remedy." See also

Pine Lake, etc., vs. Layfayette, etc., 53 Fed. Rep., 853.
Robb vs. Vos, 155 U. S., 13.
Johnson vs. Missouri Pac., etc., 52 Mo. App., 407.
Dyckman vs. Sevatson, 39 N. W. (Minn.), 73.
White vs. White, 34 Atl. (Vt.), 425.

As soon as the choice is made between the alternative remedies, the election is complete and the bar is absolute.

"No suitor is allowed to invoke the aid of the courts upon "contradictory principles of redress, upon one and the same line "of facts."

Moller vs. Tuska, 87 N. Y., 166.

If the defendant in error was right in his contention that the assessment had been merged in a contract of compromise, then it follows that he cannot now possibly be right in contending that the assessment is still in force. If the identity of the obligation on the part of the plaintiff in error as established by law, had once disappeared, even for an instant, it could not again be created by any power; and it is immaterial whether the defendant in error was able to recover upon the alleged contract of compromise, or not. He has elected to assert the existence of a contract in place of the assessment, and he will not now be heard to say, even though he has failed to uphold his contention, that no such contract ever existed and that therefore the original assessment is still in force.

This question is fully discussed in

Thomas vs. Joslin, 1 Am. St. Rep., 624 and notes.
Fowler vs. Bowery, etc., 113 N. Y., 405; 10 Am. St. Rep., 479 and notes.

The theory of the assessment, and its disappearance into a contract, are absolutely inconsistent. It is impossible to imagine the existence of both at the same time. Hence, the rule which permits various actions upon concurrent remedies cannot be invoked to prevent the bar claimed by plaintiff in error; nor does it come within the rule applicable to a mistaken remedy, which permits the suing party to institute another action in the proper form.

Nor does the failure of defendant in error to secure satisfaction by means of the remedy which he adopts, furnish any excuse for permitting him to resort to another.

Goss vs. Mather, 46 N. Y., 689.
Farwell vs. Myers, 59 Mich., 179.
Acer vs. Hotchkiss, 97 N. Y., 395.
Nelson vs. Carrington, 6 Am. Dec., 519.

The test of inconsistency as applied to election, in the enforcement of contractual rights, seems to be that where one action is founded upon its affirmance and the other upon its disaffirmance, the bar will be complete.

Connihan vs. Thompson, 111 Mass., 270.

As, where a party is entitled to rescind a contract for any reason (such, for instance, as fraud or lack of authority), he loses the right to rescind, if he brings an action to enforce the contract.

This is exactly the case at bar, where the defendant in error saw fit to affirm the alleged contract of compromise so far as he could do so, by accepting the property of the plaintiff in error, and retaining it to the end, and afterwards instituting an action to enforce the same. Can he now be heard to disaffirm the same contract, while still retaining the property, and proceed to enforce the original obligation out of which the alleged contract arose?

We do not see how it is possible for the defendant in error to avoid one or the other of the horns of this dilemma. He must either affirm or disaffirm the contract, as embodied in the proposal of the plaintiff in error to compromise the assessment; and

if he disaffirms it he must return to the plaintiff in error the property received by him under the proposal and rely solely upon his right to enforce the original assessment.

THE SEVENTH ASSIGNMENT OF ERROR.

This assignment relates to the error of the court in entering the findings and conclusions presented by the defendant in error.

It is unnecessary to add anything to what has been already stated, to show that this was error on the part of the court, except to call attention to the fact that no allowance was made to the plaintiff for anything whatever on account of *the lots* conveyed to the receiver. What seems to us a remarkable statement is that already several times adverted to and found in the conclusion of law, that the plaintiff in error is entitled to "a credit of "$200 of date of April 29th, 1897, on account of the transfer of "lots three (3) and four (4), block twenty-seven (27), Corrected "Plat of South Bend, *if he would accept the same*, but as he de-"clines to say whether he will accept the same or not, the court "concludes that it has no right of its own motion and *without the* "*assent* of the defendant."

If the court had no right to make the credit, then it had no right to make the assent of the plaintiff a condition for its allowance. Why should plaintiff upon any ground of law or justice, accept a paltry $200 in consideration of property which the evidence shows was worth six times that amount? And why should it be thought fair or equitable for him to do so when the receiver received the conveyance in pursuance of an agreement which he himself "violated," *according to his own admission*. (See Pr. V. of plaintiff's answer and defendant's reply, Transcript, pp. 36 and 39).

THE EIGHTH ASSIGNMENT OF ERROR.

That the court erred in entering judgment against the plaintiff in error, follows from what has already been said.

Respectfully submitted,

T. O. ABBOTT,
Attorney for Plaintiff in Error.

FILE COPY.

Office Supreme Court U. S.
FILED
NOV 14 1904
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 58.

ADOLPHUS F. McCLAINE, PLAINTIFF IN ERROR,

vs.

GEORGE C. RANKIN, AS RECEIVER OF THE FIRST NATIONAL BANK OF SOUTH BEND, WASHINGTON, DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR (BY LEAVE OF COURT).

T. O. ABBOTT,
Attorney for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 13667

(18,972.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 58.

ADOLPHUS F. McCLAINE, PLAINTIFF IN ERROR,

vs.

GEORGE C. RANKIN, AS RECEIVER OF THE FIRST NATIONAL BANK OF SOUTH BEND, WASHINGTON, DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

Additional Argument, by Leave of Court, in Support of the First Assignment of Error, viz., that This Action is Barred by the Statute of Limitations.

In answer to the argument of defendant in error that the words "or liability," in subdivision 3 of section 4800 of Ballinger's Code of Washington, includes a "*statutory* liability," we ask the court to consider the provisions of the limitations

act of Washington as embodied in the *entire* section, together with section 4798, relating to *written* contracts "or liabilities."

Section 4798 reads as follows:

"Within six years: 1. An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States.

"2. An action upon a contract *in writing*, or liability express or implied *arising out of a written agreement.*

"3. An action for the rents and profits or for the use and occupation of real estate."

Section 4800 *entire* reads as follows:

"Within three years: 1. An action for waste or trespass upon real property;

"2. An action for taking, detaining or injuring personal property including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;

"3. An action upon a contract or liability, express or implied, *which is not in writing*, and *does not arise out of any written agreement;*

"4. An action for relief upon the ground of fraud, the cause of action in such case, not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;

"5. An action against a coroner, or constable, upon a *liability* incurred by the doing an act in his official capacity and by virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution; but this subdivision shall not apply to an action for an escape;

"6. An action *upon a statute* for a penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the State, except when the statute imposing it prescribed a different limitation;

"7. An action for seduction."

It will be seen from a comparison of the foregoing sections that, so far as subdivision 2 of section 4798 and subdivision 3 of section 4800 are concerned, the one is the antithesis of

the other. One relates to contracts or liabilities growing out of contracts *in writing*, and the other relates to contracts or liabilities growing out of contracts not in writing. If this were not the intention of the legislature, then why was it necessary to specify so many other kinds of "liabilities"? In these two subdivisions the word "liability" is associated with the words "contract," "express," "implied," and "written agreement." Obviously, therefore, the meaning is restricted so that it stands only for a liability founded upon a simple contract, or arising out of the breach of a simple contract. Unless this is so, all actions to recover money, as damages or penalties, are comprehended in this subdivision, and yet it is plain that the legislature did not so intend, for the same section contains six other subdivisions, each specifying a different kind of action to enforce a liability, which must be commenced within the same period of three years.

In support of this view and in addition to the authorities already cited, we cite:

Hawkins *vs.* Furnace Co., 40 Ohio State, 507.

Other authorities are not accessible owing to the absence of former briefs which cannot be obtained for some days. Taken in connection with the remarks of Wood (Statute of Limitations, secs. 36 and 39), it would seem that the conclusion is irresistible that the liability of the plaintiff in error is barred because it is a "liability not otherwise provided for" in the statutes of Washington.

Mr. Wood says that "statutory" liabilities are "not within the statutes adopted in the several States applicable to simple contracts, *unless expressly made so.*" Hence the term "liability" as used in this statute does not relate to a *statutory* liability.

The opinion of the circuit court of appeals, holding adversely to the contention of plaintiff in error, is found at 106 Fed. Rep., p. 791, and reads as follows, to wit:

MORROW, circuit judge (after stating the facts):

"It appears that this suit was commenced more than two and less than three years after the date when the assessment levied by the comptroller became due. The insolvent corporation and the defendant being citizens of the State of Washington, the laws of that State as to limitation of actions apply. The plaintiff in error contends that the case is governed by subdivision 3 of section 4800 of Ballinger's Annotated Codes and Statutes of Washington, which provides that 'an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument,' may be commenced within three years after the cause of action shall have accrued. The court below rules that the liability sued upon, namely, that of a stockholder in a national bank, was not contractual, but statutory only, and therefore the suit did not come within the provisions of section 4800, but was governed by section 4805 of the same Code, providing that 'an action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued.' The case thus turns upon the question whether or not the liability of a stockholder in a national bank can be regarded as contractual. Section 5139 of the Revised Statutes (national banking act) provides that shares of stock in a national bank shall 'be deemed personal property and transferable on the books of the association in such manner as may be prescribed by the by-laws or articles of association;' and 'every person becoming a shareholder of such transfer shall in proportion to his shares succeed to all the rights and liabilities of the prior holder of such shares, and no change shall be made in the articles of association by which the rights, remedies or security of the existing creditors of the association shall be impaired.' By section 5151 it is provided that 'the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts and debts of such association, to the extent of the par value of their stock therein in addition to the amount invested in such shares.' Here is a statutory liability, but it is a liability involving all the elements of a contract. The shareholder of such an association has performed a voluntary act in becoming an owner of stock in the

association, and this voluntary act has of itself and by force of its contractual character called into existence specific obligations whose nature and extent are determined by the law. When a national banking association is formed, it is in compliance with the terms of the statute, and its stock is obtainable on definitely stated terms. There is nothing compulsory in the transaction. The act of acquiring ownership is purely voluntary. The statute merely attaches conditions to the ownership of the stock. The purchaser of the stock accepts these conditions, and the acts are then completed which give the obligation existence in a contractual form. This question was before the Supreme Court of the United States in Carrol *v.* Green, 92 U. S., 509, 513, 23 L. Ed. 738. The defense to the action was the claim that it was barred by the statute of limitations. It was held that the remedy was an action upon the case, founded upon a contract, and as such was barred by the statute of limitations. The court, in arriving at this conclusion, said :

> "'The legislature created the corporation and prescribed certain terms to which the stockholders should be subjected. This was an offer on the part of the State. It could be accepted or declined. There was no constraint. By taking the stock, the terms were acceded to, the contract became complete, and the stockholders were bound accordingly. The same result followed which would have ensued under the like circumstances between individuals. The assent thus given and the promise implied are of the essence of the liability sought to be enforced in this proceeding. If a remedy at law were necessary, clearly it must have been in case.'

"In Metropolitan R. Co. *v.* District of Columbia, 132 U. S., 1, 13; 10 Sup. Ct., 19, 33 L. Ed., 231, the action was brought by the District of Columbia, a municipal corporation, to recover from a street railroad company the cost of maintaining pavements in a street, which the company was, by its charter, bound to maintain. The charter was granted by an act of Congress. One of the defenses interposed to the action was the statute of limitations. This defense was overruled by the lower court on the ground that the action was founded on a statute, and that the statute of limitations did not apply

to actions founded on statutes or other records or specialties, but only to such as are founded on simple contract or tort. The Supreme Court held that the lower court was in error in supposing that the action was founded on the statute. 'It was,' the court said, 'an action on the case upon an implied assumpsit arising out of the defendant's breach of a duty imposed by statute and the required performance of that duty by the plaintiff in consequence. This raised an implied obligation on the part of the defendant to reimburse and pay to the plaintiff the moneys expended in that behalf. The action is founded on this implied obligation, and not on the statute, and is really an action of assumpsit. The fact that the duty which the defendant failed to perform was a statutory one does not make the action one upon the statute. The action is clearly one of those described in the statute of limitations.' The cases cited in support of this doctrine are Carrol *v.* Green, *supra;* Beatty's Adm'r *v.* Burnes' Adm'rs, 8 Cranch, 98, 3 L. Ed., 500; McCluny *v.* Silliman, 3 Pet., 270, 7 L. Ed., 676.

"In Richmond *v.* Irons, 121 U. S., 27, 55; 7 Sup. Ct., 788, 30 L. Ed., 864, the question was whether the personal liability of a stockholder in a national bank for the debts of the corporation survived against his personal representatives. The court, in distinguishing the provisions of the national banking act from the language of the statutes of Massachusetts, points out that under the former the liability of a stockholder in the bank arises upon a contract. The court says:

> "'Under that act (the national banking act) the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder.'

"And in the case of Bank *v.* Hawkins, 174 U.S., 364, 372; 19 Sup. Ct., 739, 742; L. Ed., 1007, 1011, in speaking of the contention that the liability of the stockholder in a national bank to respond to an assessment in case of insolvency is not contractual, but statutory, the court said:

> "'Undoubtedly, the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory; but, as the ownership of the stock in most cases arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation.'

"In the case of Howarth *v.* Lombard (Mass.), 56 N. E., 888, the supreme court of Massachusetts declares this doctrine to be correct, holding that there is a contractual element entering into the liability of a bank stockholder, although the liability is founded on a statute. 'The undertaking,' the court says, 'is as if one subscribing for stock expressly agreed to take and hold it under a previously prepared contract in writing that all who should become holders of the stock should pay the amount of their subscriptions to the corporation when needed, and should pay the additional sum to create a fund for creditors if the corporation should become insolvent, and a receiver should be appointed to collect it.' In a similar case the court of appeals of New York held the liability of a bank stockholder to be a contractual obligation, growing out of an implied assent to the statutory conditions on which the banking association was organized. Howarth *v.* Angle (N. Y. App.), 56 N. E., 489. See, also, Witters *v.* Sowles (C. C.), 38 Fed., 703, and Hutchings *v.* Lampson (C. C.), 82 Fed., 961. It follows, then, that the liability of the defendant in error as a stockholder of a national bank must be held to be not only statutory, but contractual as well. The action brought by the plaintiff in error therefore comes within the limitations of subdivision 3 of section 4800, Ballinger's Ann. Codes & St. Wash. Judgment reversed, with directions to the circuit court to overrule the demurrer."

Respectfully submitted.

T. O. Abbott,

Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States

ADOLPHUS F. McCLAINE,
Plaintiff in Error,

vs.

GEORGE C. RANKIN, Receiver of the First National Bank of South Bend, Washington,
Defendant in Error.

No. 88,
October Term,
1903.
(13,772.)

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

Brief of Defendant in Error.

F. F. OLDHAM,
Attorney for Defendant in Error.

IN THE

Supreme Court of the United States.

ADOLPHUS F. McCLAINE,
Plaintiff in Error,
vs.
GEORGE C. RANKIN, Receiver of the First National Bank of South Bend, Washington,
Defendant in Error.

No. 58,
OCTOBER TERM,
1904.
(18,972.)

STATEMENT.

This action was brought by the receiver of the First National Bank of South Bend, Washington, against Adolphus F. McClaine, a stockholder in said bank, for the recovery of the proportionate amount due on his stock of an assessment levied by the Comptroller of the Currency on the capital stock of said bank. The bank suspended business August 10, 1895, and the assessment was made payable on or before September 17, 1896. This suit was commenced in the Circuit Court of the United States for the Western Division of the District of Washington on August 15, 1899, more than two years and less than three years after the date when the assessment became due. A demurrer to the complaint was sustained by the Circuit Court on the ground "that the action was not commenced within the time limited by law." The plaintiff having declined to plead further, final judgment was entered dismissing the action. This

judgment was reversed by the Circuit Court of Appeals for the 9th Circuit, and the cause remanded to the Circuit Court for further proceedings. (106 Fed., 791.)

After a second demurrer to the complaint by defendant was overruled, he filed an answer denying many allegations of the petition and pleading two affirmative defenses.

The first affirmative defense alleges that, on December 30, 1897, the receiver of the First National Bank of South Bend began an action against the defendant in the Superior Court of the State of Washington for Pierce County based entirely upon the same cause of action. On the same date plaintiff obtained judgment upon default which was afterward set aside by the court. Thereafter, March 10, 1898, plaintiff dismissed the action "without prejudice at plaintiff's cost." Thereafter, on April 25, 1898, on application of the defendant, a journal entry was made striking out the words "without prejudice," the journal entry reciting that plaintiff consented "that the words 'without prejudice' in said dismissal might be stricken out."

The second affirmative defense, which also contained a number of counter-claims, all of which were stricken out by the Circuit Court, alleges that the receiver on or about April 5, 1897, instituted another suit in the same State Court against defendant to recover the assessment; that about April 8, 1897, in consideration of the immediate dismissal of the action, defendant conveyed to the receiver certain real estate at South Bend at an agreed price of $415.83, of which $215.83 was to be applied in payment of a claim held by the receiver against one J. W. Morgan, and the balance, $200.00, was to be credited upon the assessment; that on December 30, 1897, in disregard of his agreement to dismiss the action, the receiver obtained a judgment by default against the defendant, which was afterward set aside by the court; that thereafter the defendant made an effort to com-

promise the balance of the assessment in excess of the amount credited thereon, and the receiver accepted the sum of $200.00 in gold to be held in trust for this defendant until said further proposal should be confirmed and ratified by the Comptroller of the Currency. It is alleged that the Comptroller of the Currency never ratified or confirmed the proposition of defendant to compromise the balance of the assessment due from him.

The cause was tried by the court, a jury having been waived, and finding of facts was entered with conclusions of law, and judgment was rendered for the amount of the assessment, with interest from the date it was payable, less a credit of $200.00, amount deposited. The court offered to credit $200.00 on account of the conveyance of land, but defendant having declined to say whether he would accept the credit or not, it was not given. (Record, page 21.)

This judgment was affirmed by the United States Circuit Court of Appeals.

ARGUMENT.

The Statute of Limitations.

It is contended by the plaintiff in error that the cause of action is barred by the Statute of Limitations. It is conceded by the defendant in error that the statutes of the State of Washington are applicable. The statutes of Washington contain no provisions in reference to a liability created solely by statute "except for a forfeiture or penalty." Plaintiff in error contends that so far as the Statute of Limitations is concerned, the action is one arising out of a statute, and there being no express provision of the statute relative to such actions, it comes under Sec. 4805 of Ballinger's Code of Washington, as follows:

> "An action for relief not hereinafter provided for shall be commenced within two years after the cause of action shall have accrued."

The defendant in error relies on the provision in the statutes of the State of Washington, which requires that "an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument," shall be brought within three years.

(Ballinger's Code of Washington, Sec. 4800.)

The contention of defendant in error was fully sustained by the United States Circuit Court of Appeals in this cause, reported under the title of Aldrich *vs.* McClaine, 106 Fed. Rep. 791.

The Court says, after a full citation of authorities, "The liability of the defendant in error as a stockholder of a national bank must be held to be not only statutory but contractual as well. The action brought by the plaintiff in error, therefore, comes within the limitations of sub-division 3 of Sec. 4800 Ballinger's Ann. Codes and S. D. Wash."

In the case of Concord First National Bank *vs.* Hawkins, 174 U. S. 364, the Receiver of a National Bank brought suit to recover an assessment levied upon stock owned by another national bank. The stock was held by the defendant bank as an investment of part of its surplus funds. In discussing the nature of the liability of defendant, whether it were statutory or contractual, this court said, "In the present case it is sought to escape the force of these decisions by the contention that the liability of a stockholder in a national bank to respond to an assessment in the case of insolvency is not contractual, but statutory. Undoubtedly, the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But as the ownership of the stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation."

Since the decision of this question by the U. S. Circuit Court of Appeals, this court has decided the case of McDonald *vs.* Thompson, 184 U. S., p. 71, where it was contended by the Receiver of a National bank that a provision of the Statute of Limitations relating to contracts in writing was applicable to the action brought to recover an assessment upon a shareholder levied by the Comptroller of the Currency. This court held that the action was not brought upon a contract in writing, but upon an implied contract not in writing or upon a liability created by statute. The statute which was found applicable to the action was as follows:

> "Sec. 11. Within four years, an action upon a contract not in writing, express or implied, an action upon a liability created by statute other than a forfeiture or penalty."

In the case now before the court the statute undertakes in a single provision to cover actions upon contracts and liabilities, both contractual and statutory. The language is as broad as it can be made. The "liability" referred to is not limited except by the clause "which is not in writing and does not arise out of any written instrument." We respectfully submit, therefore, that the case of McDonald *vs.* Thompson is conclusive in favor of the defendant in error in this action.

If the statutes of Washington contained one provision as to contracts and another as to statutory liabilities, it would be necessary to determine which statute was applicable. In that event, we should contend that the statute relating to contracts rather than the statute relating to liabilities created solely by statute, would apply to this action.

The contractual liability of defendant is direct and the statutory liability is remote. He subscribes for stock

subject to a statute which becomes part of his contract, making him liable for the assessment when levied. By reason of his subscription it became defendant's statutory duty when an assessment was levied to pay it. In Metropolitan Railroad *vs.* District of Columbia, 132 U. S., p. 1, this court says, page 13, "The fact that the duty which the defendant failed to perform was a statutory one, does not make the action one upon the statutes. The action is clearly one of those described in the Statute of Limitations." The case of Carroll *vs.* Green, 92 U. S., 509, is strongly in point. There the action was brought against shareholders of an insolvent bank to enforce their liability for double the amount of their stock, according to the provisions of the charter. It was held by this court that the liability of the shareholders arose from their acceptance of the charter and their implied promises to fulfill its requirements and that the legal remedy to enforce it was an action on the case to which the Statute of Limitations would apply; and, hence, that it applied to a bill in equity founded on the same application.

The statute imposing a liability upon one who subscribes to stock in a corporation is substantially a part of the charter of the corporation.

Power of the Deputy Comptroller to Levy an Assessment.

Plaintiff in error contends that it is beyond the power of the Deputy and Acting Comptroller to levy an assessment.

The Act of June 3, 1864 (13 Stat., 99), provides "There shall be in the Bureau of the Comptroller of the Currency a Deputy Comptroller of the Currency, to be appointed by the Secretary, who shall be entitled to a salary of two thousand eight hundred dollars a year, and who shall possess the power and perform the duties attached by law to the office

of Comptroller during a vacancy in the office, or during the absence or inability of the Comptroller."

This officer is the one who performed the duty of making the assessment, and he so described himself. The court will presume that he was the proper officer and was acting within the terms of the statute, until the contrary is shown by proof in the proper proceeding.

Alleged Defect in Assessment.

Plaintiff in error after the second assignment claims that the complaint does not state what the total capital stock of the association was at the time the assessment was levied.

The complaint states in Paragraph 3 of the Record, p. 2, that the Comptroller "levied an assessment and made a requisition upon the shareholders of the said The First National Bank of South Bend, for Fifty Thousand ($50,000.00) Dollars," * * * and "made a demand upon each and every one of said shareholders for One Hundred ($100 00) Dollars, upon each and every share of the capital stock of said association held and owned by them respectively."

In Paragraph 5, it is alleged that "The defendant was the owner of Twenty-five (25) shares of the capital stock of said Bank, of the par value of One Hundred ($100.00) Dollars per share."

In Paragraph 8, it is alleged "That by virtue of the premises, and the statute in such case made and provided, the defendant is indebted to the plaintiff in the sum of Twenty-five Hundred ($2500.00) Dollars, and interest thereon," etc.

It is a clear deduction from these allegations that the capital stock was Fifty Thousand ($50,000.00) Dollars, and that the face value of each share was One Hundred ($100.00) Dollars. The Circuit Court of Appeals had no trouble in making this deduction, but we submit that it is

unnecessary for the complaint to state the total capital stock of the association. It is sufficient for defendant to be informed of the amount of his assessment and to be assured that no discrimination is made against him in favor of other shareholders.

The Alleged Agreement to Dismiss Suit.

In discussing this assignment, we desire first to call the court's attention to the facts as disclosed by the Record. On page 15 of the Record is the paragraph in the answer of the plaintiff in error to the complaint with reference to the alleged compromise. It is alleged therein that in consideration of the immediate dismissal of the first action brought on the assessment in the State Court, that the defendant in said action, plaintiff in error here, agreed to sell to the Receiver certain real estate in South Bend for an agreed price, part of which was to pay the debt of another party to the bank, and the remainder was to be applied as a credit on the claim sued on in this action, and that the Receiver accepted the proposition and requested the execution of the deed; that the deed was executed and delivered; that the Receiver did not dismiss the action in accordance with the agreement, but filed the papers in the case and took a judgment by default.

There is no finding of fact on the subject of this compromise by the court. (Record pp. 20–21.)

On page 41 of the Record, the letter containing the proposition and the response thereto, which constituted the evidence of the defendant in error on the proposition of compromise, speak for themselves and show that the price of the real estate was absolutely fixed, as well as terms upon which it was to be conveyed, and they were fully consummated, as appear in the answer of the plaintiff in error in this case, on page 15 of the Record. Here it is distinctly alleged that the deed was given.

It does not appear that the Comptroller of the Currency ever approved, or that any court of competent jurisdiction ever ordered, any settlement of the claim against the defendant. The Receiver, acting under the direction of the Comptroller of the Currency, had certainly no power to release the defendant from any part of his obligation, or to accept anything other than money as part payment of such obligation. He received Two Hundred ($200.00) Dollars in money from the defendant, which has been credited, and for which no judgment has been rendered. It seems that he has received also a tract of land. What disposition was made of this land does not appear. He was authorized to sell it. Whether he did sell it or not does not appear in the Record. It is shown, however, that the court offered to give plaintiff in error credit for the land, if he so desired. He had an opportunity to obtain the full value of his land at that time, but failed to avail himself of the privilege.

It will be observed that there is a contradiction between plaintiff's pleadings and his evidence on the subject of the proposed compromise. He alleges, on page 15 of the Record, that the conveyance of the land was made in consideration of the immediate dismissal of the action. On page 16 of the Record, he states that thereafter the defendant made further proposals to the Receiver to compromise and settle the balance of the assessment. The evidence shows (Record, page 14) that the proposition was made in a single letter dated April 8, 1897.

The defendant failed on May 1, 1897, to pay the $425.00; also on August 1, 1897, to pay $625.00, and on November 1, 1897, to pay a further installment of $625.00. He had, therefore, failed entirely to perform any part of his executory agreement at the time the Receiver took judgment against him in December, 1897. If there was accord there was clearly no satisfaction.

Res Judicata.

It is claimed that the action in the State court on the assessment is a bar to this action.

After the final judgment taken by default in that action was set aside on the application of the plaintiff in error (defendant in said action), the plaintiff voluntarily dismissed the case. Why this was done does not appear, but probably on account of the letter of defendant in the action, which appears on page 42 of the Record, the letter being dated April 8, 1897. Defendant in the action then moved to set aside the order because he had not been served with notice of the application for dismissal and because the entry of dismissal contained the words "without prejudice."

The Record shows that plaintiff consented that the words "without prejudice" in said dismissal might be stricken out, and they were stricken out. (Record, p. 14.)

It is claimed by plaintiff in error that the effect of this consent by plaintiff was to make the judgment *res judicata.* He argues that the plaintiff by consenting that the words "without prejudice" might be stricken from the original entry, agreed not to bring another action. We think it obvious that no such inference can be drawn from the consent of the plaintiff. The effect of the order and agreement was simply to leave the former entry as if the words "without prejudice" had not been contained therein. That was the sole object and purpose and extent of the order striking out the words.

The Receiver should not by implication or construction be held to have intended to enter into an agreement which he had no power to make.

Under the Statute of Washington, and indeed, under the law generally on the subject, it is not necessary for an order

to show that the dismissal was without prejudice, but if it shows that it was voluntary dismissal, and in fact, a voluntary non-suit by plaintiff, it is no bar to another suit on the same cause of action.

Section 409 & 411, Hill's Ann. Stats. & Code of Wash.;

Secs. 5085 to 5087, Ballinger's Code of Wash.

Under the Code procedure of the State of Washington, and which apply in the trial of this action in the United States court, a voluntary dismissal is treated as a voluntary non-suit.

The plaintiff, under Section 409, may, at any time before the jury retire to consider of their verdict, unless a set-off be interposed as a defense, or unless the defendant sets up a counter-claim to the specific property or thing which is the subject matter of the action, dismiss his case or take a non-suit.

This being a jury case, tried to the court under stipulation, and there being no off-set or counter-claim, the plaintiff had a right to a voluntary dismissal at any time before a judgment was entered on the merits.

Section 411 provides that "When a judgment of non-suit is given, the action is dismissed; but such judgment shall not have the effect to bar another action for the same cause."

Under the latter section, even if there is a trial, and the evidence of plaintiff all introduced, and the defendant should move for a non-suit and it should be granted, this would not be a bar to another action for the same cause.

Under the code system of pleading and practice, the authorities hold that in an action at law, as is the one under consideration, even after the plaintiff has put in his evidence on the trial, the dismissal of the complaint has no

more force than a non-suit at common law, and does not bar a subsequent action for the same cause.

Black on Judgment, Sec. 703.
Davenport *vs.* Turpin, 43 Cal., 597.
Wheeler *vs.* Buckman, 51 N. Y., 391.
Bond *vs.* McNider, 3 Ired., 440.
Clews *vs.* Cleghorn, 13 Ind., 438.

The Statute of Washington (Hill's Code, Sec. 406; Ballinger's Code, Sec. 5080) defines a judgment to be "The final determination of the rights of the parties in the action."

We think that the authorities cited by plaintiff in error on this point have no application, and therefore do not enter into a criticism of them. There was no answer or other pleading by the defendant in the case in the State Court, and no issue, and no trial on the merits.

A number of other objections of a technical nature are made to the judgment by plaintiff in error, all of which we think are effectually disposed of by the opinion of the United States Circuit Court of Appeals (Record, pp. 52–55). The Bill of Exceptions does not contain any statement that it contains all the evidence introduced by the parties on the trial. The Finding of Facts made by the court are sufficient to sustain the judgment rendered by the court. It appears upon the whole record, and is not seriously denied, that the First National Bank of South Bend was insolvent and in the hands of a Receiver duly appointed by the Comptroller of the Currency; that the defendant was a shareholder owning twenty-five (25) shares of stock, upon which an assessment was levied of one hundred per cent. It is impossible to find in the entire record, from the beginning to end, why the defendant should not have paid the assessment. It does not appear that any contract releasing him

from his assessment was ever made, or intended, by the Receiver. He has obtained credit for all the money he has ever paid upon his assessment, and is entitled to credit for the land whenever he is willing to accept the same.

It is submitted that upon the whole record there does not appear to have been any error committed by the court to the prejudice of the plaintiff in error.

Respectfully submitted,

F. F. OLDHAM,

Attorney for Defendant in Error.

Supreme Court of the United States.

No. 58.—October Term, 1904.

Adolphus F. McClaine, Plaintiff in Error, *vs.* George C. Rankin, as Receiver of the First National Bank of South Bend, Washington.	In error to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 6, 1905.]

The First National Bank of South Bend, Washington, became insolvent and was closed August 10, 1895, and on the seventeenth day of the same month one Heim was appointed receiver, who was succeeded by Aldrich, and Aldrich by George C. Rankin.

August 17, 1896, the Acting Comptroller of the Currency levied an assessment against the shareholders of the bank in enforcement of their statutory liability. Adolphus F. McClaine was one of the stockholders, was notified of the levy, and demand was duly made of him to pay the assessment on or before September 17, 1896, and shortly thereafter an action was commenced against him by the receiver to recover the same. Pending the action, efforts to settle the claim were made. Subsequently, the action was dismissed. Thereupon the receiver brought an action against McClaine upon an alleged contract of compromise, which went to trial, and the receiver took a non-suit. The present action was then brought on the assessment, August 15, 1899, and McClaine set up the statute of limitations by demurrer, which the Circuit Court sustained, and dismissed the action. 98 Fed. Rep. 378. The cause was taken to the Circuit Court of Appeals, and the judgment of the Circuit Court reversed. 106 Fed. Rep. 791.

The case having been remanded, the Circuit Court overruled the demurrer, McClaine answered, and a trial was had, resulting in judgment for the receiver, which was affirmed by the Circuit Court of Appeals. 119 Fed. Rep. 110. This writ of error was then brought.

The following are sections of the statutes of Washington in relation to limitations, as found in Ballinger's Code:

"§ 4796. Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued, except where in special cases a different limitation is prescribed by statute; but the objection that the action was not commenced within the time limited can only be taken by answer or demurrer.

"§ 4797. The period prescribed in the preceding section for the commencement of actions shall be as follows: . . .

"§ 4798. Within six years: 1. An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States:

"2. An action upon a contract in writing, or liability express or implied arising out of a written agreement:

"3. An action for the rents and profits or for the use and occupation of real estate."

"§ 4800. Within three years: 1. An action for waste or trespass upon real property;

"2. An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;

"3. An action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;

"4. An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;

"5. An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity and by virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution; but this subdivision shall not apply to action for an escape;

"6. An action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the State, except when the statute imposing it prescribed a different penalty [limitation];

"7. An action for seduction and breach of promise of marriage."

"§ 4805. An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

Mr. Chief Justice Fuller delivered the opinion of the Court:

It is conceded that, in the absence of any provision of the act of Congress creating the liability, fixing a limitation of time for commencing actions to enforce it, the statute of limitations of the particular State is applicable. Rev. Stat. 721; *Campbell* v. *Haverhill*, 155 U. S. 610. If, then, this action was barred by the statute of limitations of the State of Washington, that ended it, and both judgments below must be reversed and the cause remanded to the Circuit Court with a direction that judgment be entered for defendant.

Reference to the State statutes shows that subdivision 2 of section 4798 relates to "an action upon a contract in writing, or liability express or implied arising out of a written agreement," while subdivision 3 of section 4800 relates to "an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument." The one relates to contracts or liabilities growing out of contracts in writing, and the other to contracts or liabilties growing out of contracts

not in writing. The receiver's contention is that the case falls within subdivision 3 of section 4800, imposing the limitation of three years. If it does not, it is not otherwise provided for, and falls within section 4805, which fixes the limitation at two years.

And as this action was commenced within three years, but not within two years, after the assessment became due and payable, the question is whether subdivision 3 of section 4800 applies.

It is contended that the meaning of the word "liability" as used in that subdivision is not restricted to contract liabilities, but reading it with subdivision 2 of § 4798, and in view of the enumeration of other actions to enforce liabilities, we think that this cannot be so, and, indeed, the subdivision has been construed by the Supreme Court of Washington as applicable only to contracts. *Suter* v. *Wenatchee Waterpower Company*, 35 Wash. 1; *Sargent* v. *Tacoma*, 10 Wash. 212. The Circuit Court was of that opinion when the case was originally disposed of, and held that the cause of action arose by force of the statute and did not spring from contract. 98 Fed. Rep. 378. But that judgment was reversed by the Circuit Court of Appeals on the ground that the liability was not only statutory but contractual as well, and that the limitation of three years applied in the latter aspect. 106 Fed. Rep. 791. Conceding that a statutory liability may be contractual in its nature, or more accurately, *quasi*-contractual, does it follow that an action given by statute should be regarded as brought on simple contract, or for breach of a simple contract, and, therefore, as coming within the provision in question?

The national bank act provides that "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." Rev. Stat. § 5151.

And under other sections the duty is imposed on the Comptroller of the Currency to give the creditors of an insolvent national bank the benefit of the enforcement of this personal liability, and to decide whether the whole, or a part, and, if only a part, how much, shall be collected, he being also authorized to make more than one assessment, as circumstances may require. *Kennedy* v. *Gibson*, 8 Wall. 498; *Studebaker* v. *Perry*, 184 U. S. 258, and cases cited. But even his decision does not determine the liability except as to contracts, debts, and engagements of the bank lawfully incurred. *Schrader* v. *Man. National Bank*, 133 U. S. 67.

The liability is conditional, and statutes of limitation do not commence to run until after assessment has been made. *McDonald* v. *Thompson*, 184 U. S. 71.

In the latter case the statute of Nebraska provided (§ 10) that actions must be commenced within five years, "upon a specialty, or any agreement, contract or promise in writing, or foreign judgment;" and (§ 11) within four years "upon a contract not in writing, express or implied; an action upon a liability created by statute other than a forfeiture or penalty."

The action was brought on an assessment upon the stockholders of a national bank to the amount of the par value of the shares, and not to recover an amount unpaid on the original subscription, and it was held that the five-year limitation did not apply, because the cause of action was not upon a written contract, but that the four-year limitation applied, "whether the promise raised by the statute was an implied contract not in writing or a liability created by statute," no distinction between them as to the limitation being made by the State statute. And Mr. Justice Brown, speaking for the court, said: "Whether the promise raised by the statute was an implied contract not in writing or a liability created by statute, it is immaterial to inquire. For the purposes of this case it may have been both. The statute was the origin of both the right and the remedy, but the contract was the origin of the personal responsibility of the defendant. Did the statute make a distinction between them with reference to the time within which an action must be brought, it might be necessary to make a more exact definition; but as the action must be brought in any case within four years, it is unnecessary to go farther than to declare what seems entirely clear to us, that it is not a contract in writing within the meaning of section 10 of the Nebraska act." And it was also said: "Granting there was a contract with the creditors to pay a sum equal to the value of the stock taken, in addition to the sum invested in the shares, this was a contract created by the statute, and obligatory upon the stockholders by reason of the statute existing at the time of their subscription; but it was not a contract in writing within the meaning of the Nebraska act, since the writing—that is, the subscription—contained no reference whatever to the statutory obligation and no promise to respond beyond the amount of the subscription. In none of the numerous cases upon the subject in this court is this obligation treated as an express contract, but as one created by the statute and implied from the express contract of the stockholders to take and pay for shares in the association."

In the present case the limitation imposed on an action upon a statute for penalty or forfeiture, where an action was given, was three years, (sub. 6, § 4800,) and on any other action to enforce a statutory liability was two years, because not otherwise provided for, and, therefore, the question must be met whether this is an action brought on a contract or not. But it is an action to recover on an assessment levied by the Comptroller of the Currency by virtue of the act of Congress, and although the shareholder in taking

his shares subjected himself to the liability prescribed by the statute, the question still remains whether that liability constituted a contract within the meaning of the statute of limitations of the State of Washington.

Some statutes imposing individual liability are merely in affirmation of the common law, while others impose an individual liability other than that at common law. If section 5151 had provided that subscribing to stock or taking shares of stock amounted to a promise directly to every creditor, then that liability would have been a liability by contract. But the words of section 5151 do not mean that the stockholder promises the creditor as surety for the debts of the corporation, but merely impose a liability on him as secondary to those debts, which debts remain distinct, and to which the stockholder is not a party. The liability is a consequence of the breach by the corporation of its contract to pay, and is collateral and statutory. *Brown* v. *Eastern Slate Company*, 134 Mass. 590; *Platt* v. *Wilmot*, 193 U. S. 602. In *Matteson* v. *Dent*, 176 U. S. 521, the stock still stood in the name of the decedent, and it was decided that the statutory liability was a debt within the State law, but not that it was a true contract.

It is true that in particular cases the liability has been held to be in its nature contractual, yet it is nevertheless conditional, and enforcible only according to the Federal statute, independent of which the cause of action does not exist, so that the remedy at law in effect given by that statute is subject to the limitations imposed by the State statute on such actions.

Cases such as *Carrol* v. *Green*, 92 U. S. 559, and *Metropolitan Railroad Company* v. *District of Columbia*, 132 U. S. 1, are not controlling, for in them the right to recover was direct and immediate and not secondary and contingent. In *Metropolitan Railroad Company* v. *District of Columbia*, the charter of the company provided "that the said corporation hereby created shall be bound to keep said tracks, and for the space of two feet beyond the outer rail thereof, and also the space between the tracks, at all times well paved and in good order, without expense to the United States or to the city of Washington." The declaration set out a large amount of paving done by the city, which it was averred should have been done by the company. The action was based on the implied obligation on the part of defendant to reimburse plaintiff for moneys expended in performing the duty, which the statute imposed on defendant. In *Carrol* v. *Green* it was said: "According to the statute, the liability of 'each stockholder' arose upon 'the failure of the bank.' The liability gave at once the right to sue; and, by necessary consequence, the period of limitations began at the same time."

But here the right to sue did not obtain until the Comptroller of the Currency had acted, and his order was the basis of the suit. The statute

of limitations did not commence to run until assessment made, and then it ran as against an action to enforce the statutory liability and not an action for breach of contract.

We think that subdivision 3 of § 4800 did not apply, and that § 4805 did.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed, and the cause remanded to that court with a direction to sustain the demurrer and enter judgment for defendant.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 58.—October Term, 1904.

Adolphus F. McClaine, Plaintiff in Error, *vs.* George C. Rankin, as Receiver of the First National Bank of South Bend, Washington.	In error to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 6, 1905.]

Mr. Justice White, with whom concur Mr. Justice Brown and Mr. Justice McKenna, dissenting.

The statutes of the State of Washington limit to three years the right to bring "an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument." The cause of action here involved is now held not to be embraced within this statute, and therefore barred by the following provision: "An action for relief, not hereinbefore provided, for shall be commenced within two years after the cause of action shall have accrued."

The liability sought to be enforced is the obligation of a shareholder of a national bank to pay an amount equal to the par of his shares of stock. The Circuit Court held the action not to be one upon contract, but to enforce a conditional liability imposed by the law as an incident to ownership of bank stock, and therefore barred by two years. (98 Fed. Rep. 378.) The Circuit Court of Appeals reversed this judgment, and decided that the peried of limitation was three years, because the liability was contractual. (106 Fed. Rep. 791.)

In *Suter* v. *Wenatchee Water Power Company*, decided April 18, 1904, (35 Wash. 1,) the Supreme Court of Washington construed the provision of the statutes of limitation here involved, providing that an action might be brought within three years "upon a contract or liability, express or implied, which is not in writing," and held that it did not embrace torts, "but was evidently intended to refer to a contractual liability." The court in its opinion, among other authorities, referred to this case as decided below, saying:

"Such, in effect, was the decision in *Sargent* v. *Tacoma*, (10 Wash. 212, 215.) The same statute was construed by the United States Circuit Court, District of Washington, in *Aldrich* v. *Skinner*, (98 Fed. Rep. 375,) and also in *Aldrich* v. *McClaine*, (98 Fed. Rep. 378.) The last-named case was, on appeal to the United States Circuit Court of Appeals, reversed. (*Aldrich* v. *McClaine*, 106 Fed. Rep. 791.) The reversal was,

however, upon the ground that the liability involved was a contractual one, the lower court having held otherwise. The appellate court construed the statute itself as did the lower court."

It might well be considered that the Supreme Court of Washington regarded the interpretation of the Court of Appeals as harmonizing with its own views of the meaning of the provision in question. But be this as it may, the prior decisions of this court to me seem conclusive, since, in deciding various questions concerning the liability of stockholders in national banks to pay the double liability, this court has expressly held that such liability is contractual. (*Matteson* v. *Dent*, 176 U. S. 521, 525, 526; *Concord First National Bank* v. *Hawkins*, 174 U. S. 364, 372; *Richmond* v. *Irons*, 121 U. S. 27, 55, 56.) In *Richmond* v. *Irons* the court said (pp. 55, 56):

"Under the national banking act the individual liability of the stockholders is an essential element of the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder. We hold, therefore, that the obligation of the stockholder survives as against his personal representatives. (*Flash* v. *Conn*, 109 U. S. 371; *Hobart* v. *Johnson*, 19 Blatch. 359.) In Massachusetts it was held, in *Grew* v. *Breed*, (10 Met. 569,) that administrators of deceased stockholders were chargeable in equity, as for other debts of their intestate, in their representative capacity."

In *Matteson* v. *Dent* the evidence showed that at the time of the death of Matteson he was the owner of ten shares of stock in a national bank, a going concern. His widow and heirs, by the decree of a probate court of Minnesota, became the joint and undivided owners of the stock, which continued, however, to stand in the name of Matteson. Thereafter the bank failed, and, on the ground that they had received assets of the estate, a suit was brought against the widow and heirs for the amount of an assessment made by the Comptroller against the stock. The suit was defended on two grounds, first, that the assessment was not binding, because the bank had not failed at the time of Matteson's death and at the time when, by the decree of the probate court, the widow and heirs had become the owners in indivision of the stock; and, second, that under the national banking law they could only be made liable, in any event, each in proportion to his or her interest in the stock. In considering the first ground the court, approvingly citing the passage from *Richmond* v. *Irons* above quoted, said (p. 524):

"Because the insolvency of the bank took place after the death of Matteson, did it result that the assessment, which was predicated upon the insolvency, was not a debt of his estate? To so decide the statute must be construed as imposing the liability on the shareholder for the amount of his subscription when necessary to pay debts only in case insolvency arises during the lifetime of the shareholder. In other words, that all liability of shareholders, to contribute to pay debts, ceases by death. This construction, however, would be manifestly unsound. The obligation of a subscriber to stock, to contribute to the amount of his subscription for the purpose of the payment of debts, is contractual, and arises from the subscription to the stock. True, whether there is to be a call for the performance of this obligation depends on whether it becomes necessary to do so in consequence of the happening of insolvency. But the obligation to respond is engendered by and relates to the contract from which it arises. This contract obligation, existing during life, is not extinguished by death, but like other contract obligations survives and is enforceable against the estate of the stockholder."

And the same principle has been applied to similar liabilities imposed upon stockholders in State corporations, the court uniformly holding that the liability, although statutory in its origin, was contractual in its nature, and therefore the cause of action was transitory. (*Whitman* v. *Bank*, 176 U. S. 559; *Flash* v. *Conn*, 109 U. S. 371.)

In *Whitman* v. *Bank*, discussing a statute of the State of Kansas, the court, through Mr. Justice Brewer, said (p. 563):

"The liability which by the constitution and statutes is thus declared to rest upon the stockholder, though statutory in its origin, is contractual in its nature. It would not be doubted that if the stockholders in this corporation had formed a partnership, the obligations of each partner to the others and to creditors would be contractual, and determined by the general common law in respect to partnerships. If Kansas had provided for partnerships with limited liability, and these parties, complying with the provisions of the statute, had formed such a partnership, it would also be true that their obligations to one another and to creditors would be contractual, although only in the statute was to be found the authority for the creation of such obligations. And it is none the less so when these same stockholders organized a corporation under a law of Kansas, which prescribed the nature of the obligations which each thereby assumes to the others and to the creditors. While the statute of Kansas permitted the forming of the corporation under certain conditions, the action of these parties was purely voluntary. In other words, they entered into a contract authorized by statute."

And the principle sustained by the previous decisions of this court is also supported by the decisions of State courts of last resort. Thus, the Supreme Judicial Court of Maine in *Pulsifer* v. *Green*, (96 Me. 438,) held the doctrine to be consonant with reason and natural justice and sustained by the weight of authority, the court citing not only the decisions of this court previously referred to, but also decisions of the courts of California, Connecticut, Illinois, Kansas, Massachusetts and Michigan. And

the decisions of the State courts of last resort thus referred to were in many cases in part rested upon the previous adjudications of this court to which I have referred, those decisions being considered as conclusive on the subject of the contract nature of the liability. My mind sees no reason for saying that the doctrine thus settled is not applicable to a statute of limitations, for if the liability of the stockholder be contractual, for the purpose of enforcing the obligation, it is not by me perceived upon what principle it can be held that it is not contractual but purely statutory for the purpose of determining whether an action to enforce the liability is barred by a statute of limitations. But the unsoundness of the distinction as an original question in my opinion does not require to be demonstrated, since it is absolutely foreclosed by previous decisions of this court. Thus, in *Carrol* v. *Green*, (92 U. S. 509,) an action against stockholders of a South Carolina bank to enforce a double liability provided for in the act of incorporation, it was expressly held that as the liability was contractual it was barred by a statute of limitations applicable to simple contract indebtedness. Reference was made to decisions of the courts of New York and Massachusetts, holding the same doctrine in analogous cases, (pp. 514, 515,) and, in concluding the opinion, the court expressly noticed and overruled the contention "that the liability here in question being created by a statute is to be regarded as a debt by specialty."

Carroll v. *Green* was subsequently approved and followed in *Metropolitan Railroad* v. *District of Columbia*, (132 U. S. 1.) The action was to recover the cost of certain street paving, the liability being recited in the act of incorporation. The trial court overruled demurrers to pleas of the statute of limitations, among other reasons, upon the ground that the action was founded on a statute, and that the statute of limitations did not apply to actions founded on statutes or other records or specialties. This ruling was held to be erroneous, the court saying (p. 12):

"It is an action on the case upon an implied assumpsit arising out of the defendant's performance of that duty by the plaintiff in consequence. This raised an implied obligation on the part of the defendant to reimburse and pay to the plaintiff the moneys expended in that behalf. The action is founded on this implied obligation, and not on the statute, and is really an action of assumpsit. The fact that the duty which the defendant failed to perform was a statutory one, does not make the action one upon the statute. The action is clearly one of those described in the statute of limitations."

To avoid the controlling effect of these rulings upon this case, on the theory that by virtue of the statutes which were considered in *Carrol* v. *Green*, and the *Metropolitan Railroad Case*, the right to recover was direct and immediate, whilst in the case at bar, in consequence of provisions of the national banking act, the right to recover is secondary and contingent, is in effect, in my opinion, to overrule the cases in this court de-

termining that the liability of a stockholder in a national bank is contractual. This becomes apparent when the ground of the alleged distinction is considered. That ground is this, that as the national banking act empowers the Comptroller to determine the necessity for an assessment on the stockholders of national banks and to make a call for such assessment, thereby the obligation of the stockholder becomes secondary and contingent, and hence statutory and not contractual. To me it seems that this interpretation, whilst overruling the previous cases also originally considered, gives to the national banking act an erroneous construction. The mere fact that the act gives to the Comptroller the power of making a call on stockholders for the purpose of enforcing their contract liability, in my judgment lends no support to the proposition that the ministerial duty created to better enforce the contract must be considered as destroying the contract itself. The consequences which must arise from the new construction now placed upon the national banking act, it seems to me, will be of the most serious nature, and being unable to agree with such construction I cannot concur in the opinion and judgment of the court.

I am authorized to say that Mr. Justice BROWN and Mr. Justice MCKENNA join this dissent.

True copy.

Test:

Clerk Supreme Court, U. S.